

COPYRIGHT ROYALTY TRIBUNAL

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In the Matter of:                   :  
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JUKEBOX ROYALTY FEES               :  
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2000 L Street, Northwest  
Suite 500  
Washington, D.C.

Tuesday, June 2, 1981

The hearing in the above-entitled matter  
commenced at 10:00 a.m., pursuant to notice.

BEFORE:

THOMAS C. BRENNAN, Chairman

DOUGLAS E. COULTER, Commissioner

MARY LOU BURG, Commissioner

FRANCES GARCIA, Commissioner

ORIGINAL

C O N T E N T S

<u>Witnesses</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>
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P R O C E E D I N G S

CHAIRMAN BRENNAN: The meeting will come to order.

The notice of this meeting was published in the Federal Register on May 22, 1981. I direct notice be inserted at this point in the record.

## Sunshine Act Meetings

Federal Register

Vol. 46, No. 99

Friday, May 22, 1981

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#### **COPYRIGHT ROYALTY TRIBUNAL**

**TIME AND DATE:** 10:00 a.m., Tuesday,  
June 2, 1981.

**PLACE:** 2000 L Street, N.W., Room 500,  
Washington, D.C.

**STATUS:** Open.

#### **MATTERS TO BE CONSIDERED:**

1. Commencement of evidentiary  
hearings on distribution of 1979 jukebox  
royalties (to be continued on subsequent  
days).

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2. Proposed amendment of 37 CFR 303  
to remove requirement for recording of  
jukebox location listings in Copyright  
Royalty Tribunal (46 FR 20566).

#### **CONTACT PERSON FOR FURTHER**

**INFORMATION:** Thomas C. Brennan,  
Acting Chairman, Copyright Royalty  
Tribunal, 1111 20th Street, N.W., Room  
450, Washington, D.C., (202) 653-5175.

Thomas C. Brennan,  
*Acting Chairman.*

[S-806-81 Filed 5-20-81; 3:52 pm]

**BILLING CODE 1410-07-M**

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1           The first item on the agenda is the commencement  
2 of the hearings on the 1979 distribution of jukebox fees.  
3 In accordance with the rules of the Tribunal, witnesses are  
4 to be sworn. At this point, I request all the BMI witnesses  
5 who are present today to stand and take the oath.

6           (All witnesses sworn.)

7           CHAIRMAN BRENNAN: Mr. Duncan, you may proceed.

8           MR. DUNCAN: Thank you, Mr. Chairman and members  
9 of the Commission. I would like to make a brief opening  
10 statement. Before doing that, I would like to point out as  
11 our pre-hearing submission indicates two of our witnesses  
12 Dr. Link and Mr. Van Bracklewere not available today but  
13 will be here by 10 o'clock tomorrow morning.

14           It is hoped that we can occupy the full day,  
15 possibly letting us call a witness out of order and we should  
16 conclude by noon tomorrow. That, of course, is subject to  
17 cross-examination.

18           I don't know how long Mr. Korman would take on  
19 cross-examination with our witnesses. BMI's position and  
20 the evidence which -- I am sorry -- let me also introduce  
21 those members from BMI and my office who are here.

22           I think you have met them all. To my right Michael  
23 Faber from my office. Joel Winnik has not arrived yet but  
24 he will be here. From BMI, the president, Mr. Kramer and  
25 BMI's counsel, Mr. Chapin.

1           They have all appeared before the Tribunal before.  
2 BMI's position and the evidence which it will adduce is based  
3 on the statutory preposition that distribution of the juke-  
4 box pool should be based on performances.

5           That language is found in Section 116C5 and the  
6 Commission Tribunal is well aware mandates distribution  
7 shall be made for the year in which performances take place,  
8 the year in which performances take place.

9           So, all of our evidence is aimed to demonstrate  
10 what performances were to the extent that they can now be  
11 measured in the Year 1979. BMI will urge the Tribunal to  
12 make a distribution to it based on performances as our  
13 evidence will show.

14           We are also mindful of the Tribunal ruling on  
15 November 9, 1978, relating to the use of surveys. The  
16 language which was adopted on that date as reflected in the  
17 transcript was that a random sampling based on a summary of  
18 the records performed on jukeboxes as the most useful but  
19 not necessarily the only method to substantially determine  
20 the distribution of royalty fees pursuant to Section C of  
21 17 U.S.C. 116.

22           The issue of surveys versus other methods of proof  
23 has come up before. We are pleased to be able to rely on  
24 the ruling of the Tribunal. With it in mind and with our  
25 reliance on actual performances as specified in 116C5, BMI

1 did in January or February of this year commission a survey.  
2 Our evidence will consist substantially of the results of  
3 that survey.

4 As our pre-hearing submission indicates the survey  
5 is basically in three parts: field observations conducted  
6 by Opinion Research Corporation; the tabulation of the  
7 information recieved by Opinion Research Corporation by Data  
8 Tab and then some simple mathematical calculations based on  
9 that calculation which were performed in-house by BMI  
10 through Dr. Link. The ORI, Opinion Research survey, our  
11 evidence will show was a national survey based on in-person  
12 observation selection and frequency of jukebox play in  
13 various establishments throughout the country; 885 listening  
14 hours altogether in 758 jukebox establishments.

15 In one spiral notebook which we will show to the  
16 Commission, and hopefully, introduce samples of them into  
17 evidence from each of 235 sampling areas. Witness Kilkenny  
18 from Opinion Research Corporation will describe the methodology  
19 of that survey and how the sampling area was selected, who  
20 the field investigators were and what the contents of those  
21 booklets are.

22 Data Tab then took the booklets which were pro-  
23 duced by ORI and tabulated the results of the survey. It  
24 was a mechanical tabulation by song title and author. At this  
25 point, BMI identified which songs belonged to its repertoire

1 and which songs were non-BMI songs. Data Tab incorporated  
2 this information and produced a statistical printout by  
3 title and by author or composer and also a summary tabulation  
4 of that statistical printout.

5 At the appropriate time, we hope that offer those  
6 documents into evidence. From Data Tab is Witness John  
7 who will describe the work that they did and the results which  
8 were produced. After Data Tab had assembled its information,  
9 it was handed over to Dr. Link.

10 As Dr. Link's statement shows, he did a simple  
11 mathematical calculation which shows of the records observed  
12 by the ORC investigators and tabulated by Data Tab that  
13 as a matter of simple mathematics 54 percent of the records  
14 played belonged to BMI.

15 He used routine procedure correlating the statistics  
16 level as your rules require. That is set forth in his  
17 testimony. We could stop her because the survey alone would  
18 be a basis for distributing the '79 funds. We would argue  
19 from an ASCAP document which I will refer to later as ASCAP  
20 does that a current performance survey current statistical  
21 survey is a basis for distributing the jukebox pool which  
22 was in fact paid in a prior year.

23 We go a little further and relate the survey  
24 results to the trade charts. Witness Alan Smith from BMI  
25 will present to the Tribunal what the trade charts show in



1 terms of BMI versus other play in the first quarter of 1981.  
2 This correspondence to the quarter in which the field survey  
3 was done. He will also introduce to the panel the trade  
4 charts for the year 1979.

5 We will then call Witness Don Van Brackle who is  
6 past president of AMOA and Mr. Van Brackle will testify as  
7 he has done earlier as to the use which is made of trade  
8 charts in the jukebox industry and how play selections  
9 are made on the basis of those charts.

10 He will address himself to the issue of whether  
11 or not there is any significance to the fact that our survey  
12 was a survey of licensed as well as unlicensed jukeboxes.  
13 He will also testify briefly as to where jukeboxes typically  
14 are found.

15 Mr. Cramer will then be asked to resume the stand.  
16 He will draw the correlation between our '81 survey, '81  
17 charts, '79 charts and what a survey would have shown could  
18 we have taken the survey in 1979.

19 This presentation will indicate that BMI is entitled  
20 to not less than 57 percent of the jukebox pool. Our posi-  
21 tion is based on a current survey which the evidence will  
22 show is valid and unbiased. Granting the assumptions  
23 on which it is based will produce the 57 percent figure.

24 I would like to stress in closing as I did at  
25 the beginning that our entire case is based on performance,

1 performance of records on jukeboxes as the statute contem-  
2 plates. Thank you.

3 CHAIRMAN BRENNAN: Thank you, Mr. Duncan.

4 Mr. Korman, do you wish to make your statement now  
5 or at a later point in the proceeding?

6 MR. KORMAN: I would like to make my statement at  
7 a later point in the proceeding. I would like now to raise  
8 two questions seeking rulings from the Tribunal.

9 The first concerns the fact that in its November  
10 or October 28, 1980, statement as to justification of the  
11 percentage of fees claimed by BMI, BMI states that the  
12 justification "for such percentage results from the fact  
13 that over 60 percent of the performance of music on radio  
14 is music in the BMI repertoire, and, it is submitted, the  
15 best measures of the performance of music on jukeboxes is  
16 the performance of music on radio."

17 Now I realize that the Tribunal's means of proceed-  
18 ings are informal. Here we are faced with a statement which  
19 might be analogized to a complaint in which the parties  
20 state it is going forward on hearing on a certain theory.  
21 At a last minute, it abandons that theory and puts forth  
22 a different one.

23 I have other objections to the survey which I will  
24 make but the question I put to you, Mr. Chairman, with that  
25 respect is whether it is appropriate and whether the Tribunal

1 will accept at this juncture evidence in support of a claim  
2 that is entirely different from the evidence that we were  
3 promised. That is my first question.

4 MR. DUNCAN: May I respond?

5 CHAIRMAN BRENNAN: If you wish.

6 MR. DUNCAN: I don't agree that the justification  
7 is in the nature of a complaint. I think the justification  
8 is a statutory requirement which is pro forma as to all  
9 parties and is put in in order to meet statutory requirement.  
10 I am not aware until this moment of any suggestion that one  
11 is limited by the justification to decide which one in  
12 fact to submit.

13 More important than that is, it is not a last minute  
14 abandonment of our position. In our pre-hearing conference  
15 in February I believe we alluded to the fact that we hoped  
16 to conduct a survey. After initial hearings were set,  
17 we addressed a letter to the Commission on March 12 in which  
18 we stated we intended to take a survey of the actual jukebox  
19 performances a copy to Mr. Korman.

20 Further in our pre-hearing statement in which we  
21 exchanged witnesses and documents, we fully disclosed what  
22 our position would be at this hearing. I doubt that Mr. Korman  
23 can truly surprise. Nor do I suspect that we are bound by  
24 what was said in the justification. That was a pro forma  
25 document. Nothing in the statute suggest that we are limited

1 to what we say there.

2 CHAIRMAN BRENNAN: Mr. Korman.

3 MR. KORMAN: One comment, if I may, on Mr. Duncan's  
4 response. As the Tribunal well knows the question of a  
5 survey is one to which a great deal of attention was paid  
6 when the AMOA made its survey.

7 Mr. Duncan participated at a meeting, discussions  
8 with the Tribunal at which it was made clear the Tribunal  
9 and other parties have a real interest in any survey that  
10 is going to be made. It seems to me clear that that  
11 justification statement in November referred to a survey  
12 we would have cooperated. We would have sought speaking  
13 now for ASCAP guidance from the Tribunal as to how a  
14 survey might be made which would have been useful and to  
15 have survey which as we shall show is not a random survey,  
16 not a survey complying with the Tribunal's rules and have  
17 that brought in as the main basis for this data, I think,  
18 is quite improper.

19 I await your ruling. But my second question con-  
20 cerns the proposed BMI procedure today. It is well known  
21 that lawyers generally make terrible witnesses. Mr. Cramer,  
22 I have had occasion to observe the exception to that rule.  
23 He is a superb witness.

24 I object to Mr. Cramer being a witness at the  
25 beginning and at the end. It will hamper cross-examination.

1 I think it is improper. From the description of what he is  
2 to do is to describe the background underlying BMI presenta-  
3 tion of the survey undertaken by others. We have witnesses  
4 who have made that survey. They are going to tell you the  
5 facts. I have no idea what the background underlying BMI's  
6 presentation means.

7 What I am suggesting, Mr. Chairman, is what we  
8 have is an effort by BMI to have a lawyer, Mr. Cramer,  
9 make two arguments, an opening argument. We have had one  
10 from Mr. Duncan. An opening argument and a closing  
11 argument. He is going to be a witness.

12 I ask that he be a witness all at one time and that  
13 he not be permitted to break up his testimony. Should I  
14 be fortunate enough to demolish him on cross during the first  
15 part of the testimony, I don't want him to have another day  
16 or so to recover.

17 CHAIRMAN BRENNAN: Mr. Duncan, you want to comment  
18 on that?

19 MR. DUNCAN: I offer no apology for the fact that  
20 Mr. Cramer is the attorney. He is also the president of the  
21 claimant here. He has testified before. The fact that he  
22 is an attorney is no sense of disqualification based on  
23 prior precedent. Mr. Cramer is not being called to make  
24 an opening argument or the closing argument. I am the  
25 attorney for BMI in this proceeding. I will do such arguing

1 that needs to be done. Mr. Cramer's testimony is suggested  
2 to be bifurcated for logical evidentiary reasons only.  
3 His initial testimony will be brief and confined to the  
4 selection of ORC as participant in taking survey and the  
5 question of what ORC was asked to do and why it was selected.

6 That is the extent of his direct examination with  
7 possible one exception. It is not to give any background.  
8 It is to describe to the Tribunal how and why ORC was  
9 selected and how and why the survey was designed the way  
10 it was to the extent that he participated in it.

11 In his second proposed testimony, he will talk about  
12 something very, very different. That is the correlation  
13 between the survey, the '81 charts, the correlation between  
14 the '81 charts and the '79 charts and what a survey would  
15 have shown had a survey been conducted in '79.

16 Again, not argument but a statement based on his  
17 experience as president of BMI. I think given the limited  
18 nature of his testimony when we first proposed to call him,  
19 Mr. Korman will not be hampered on cross-examination and  
20 nor with his skill will be limited in any event.

21 His testimony will be to questions put by me and  
22 Mr. Korman will have the opportunity to object. He is  
23 testifying to two different things.

24 MR. KORMAN: I think, Mr. Chairman, Mr. Duncan's  
25 description of the second part of Mr. Cramer's testimony

1 shows that what we have said is correct. For Mr. Cramer  
2 to draw conclusions from the fact to which others will  
3 testify is pure argument. He cannot testify to facts as  
4 to what a survey would have shown had one been made in '79.

5 The correlation if any between the survey results  
6 and the charts are for the Tribunal to draw inferences from  
7 based on arguments which will be advanced by counsel.

8 That purely is a matter of argument and not  
9 testimony. I believe it is improper.

10 MR. DUNCAN: The last word, Mr. Duncan.

11 MR. DUNCAN: If there is any argument or improper  
12 question, obviously, Mr. Korman has a chance to object at  
13 the time of the question.

14 CHAIRMAN BRENNAN: The Chair denies the first  
15 objection. The Chair denies the second objection.

16 Please proceed.

17 MR. DUNCAN: Thank you. I would like to call  
18 Mr. Cramer to the stand.

19 MR. KORMAN: Note my objection for the record.  
20 Whereupon,

21 EDWARD M. CRAMER  
22 was called as a witness and having been previously duly  
23 sworn was examined and testified as follows:

24 DIRECT EXAMINATION

25 BY MR. DUNCAN:

1 Q Mr. Cramer, you have appeared before the Tribunal  
2 before. But I will ask you for the record to statement your  
3 name and business address?

4 A Edward M. Cramer, BMI's address is 320 West Fifty-  
5 Seventh Street, New York 10019.

6 Q Your position with BMI is the president?

7 A President and Chief Executive Officer.

8 Q How long have you occupied that position?

9 A Thirteen years and two months.

10 Q I would assume as president and chief executive  
11 officer your duties include the general supervision and manage-  
12 ment of the corporation; is that correct?

13 A That is correct.

14 Q Were you involved, Mr. Cramer, in planning for the  
15 presentation made, to be made at this hearing concerning  
16 distribution of 1979 jukebox royalty fees which have been  
17 made?

18 A Yes.

19 Q Would you state briefly the nature of your involve-  
20 ment and what you became involved in and what you did?

21 A When it became apparent that voluntary agreement  
22 would not be reached for the distribution of royalties  
23 for the Year 1979, I decided that one of the elements  
24 that we would present would be a survey of jukebox per-  
25 formances; what I was told to be the wishes of the Tribunal.



1 Q Were you involved in the selection of Opinion  
2 Research Corporation as the organization to conduct a part  
3 of the survey?

4 A Yes. I ultimately made the decision to retain  
5 Opinion Research Corporation to do the survey.

6 Q How did Opinion Research Corporation first come  
7 to your attention?

8 A When it was decided to have a survey, I asked our  
9 counsel, your firm, my colleague, I asked in New York to  
10 recommend organizations who could under take the survey.  
11 I reviewed the suggestions. I personally met with represent-  
12 atives of Opinion Research and decided that that would be  
13 the organization that we would retain to do this survey.

14 Q Had you had occasion, your organization, to use  
15 Opinion Research Corporation previously for a survey like  
16 this?

17 A No. That was our first contact with Opinion  
18 Research; not only my first contact, but BMI's, any officer.

19 Q You mentioned attending a meeting with represent-  
20 atives from ORC. Was there one such meeting or more than  
21 one?

22 A One that I attended, but there were many with other  
23 people at BMI.

24 Q Do you remember who from ORC was present at the  
25 meeting which you attended?

1           A     Yes. I remember at least two, Miss Kilkenny who  
2 is sitting here and Mr. Zapp or Zepp. But he was another  
3 one I met who was with Opinion Research.

4           Q     At that meeting, did you discuss, generally, what  
5 you wanted ORC to do?

6           A     Yes. In general terms we reviewed it. I told  
7 them what I wanted done.

8           Q     What did you tell them you wanted done?

9           A     I told them that we wanted a survey of jukebox  
10 performances ~~that~~ was to be objective, independent, accurate.  
11 They were to do it in their own way so they could support  
12 it before this Tribunal or any other agency.

13                It had to be done quickly because there were time  
14 restraints. But they were to be totally independent of  
15 BMI's internal operation.

16           Q     I assume there came a time when a contract was  
17 executed and agreement reached between BMI and ORC?

18           A     That is correct.

19           Q     After that contract was executed, did you have  
20 any involvement with ORC's conduct of the survey?

21           A     No, not to my recollection. I saw the results,  
22 but I did not communicate with anyone.

23           Q     I am getting to this point. Once the contract  
24 was let, you did not meet on a regular basis or a day-to-day  
25 basis?

1           A     I have no recollection of meeting with them at  
2 all.

3           Q     After that meeting?

4           A     That is right.

5           Q     Do you know what ORC was asked to do from a mechan-  
6 ical point of view not how the survey was conducted but how  
7 far were they to carry the project?

8           A     In general terms, they were to structure and  
9 actually do the on-spot survey of the performances in the  
10 jukeboxes. They were to take that survey and turn it over  
11 to someone else who would do the tabulation.

12          Q     Who was that someone else?

13          A     A company called Data Tab.

14          Q     Were you involved in the selection of Data Tab  
15 to do the tabulation?

16          A     No. I was not.

17          Q     Who was the responsible official who made that  
18 decision?

19          A     Mr. Alan Smith.

20          Q     Would you identify him for the record.

21          A     Yes. Mr. Smith is Vice President of BMI in  
22 charge of licensing.

23          Q     Do you have any personal knowledge of what tabula-  
24 tion Data Tab did? Were you involved in that process at all?

25          A     Not at all.

1 MR. DUNCAN: May I have the Tribunal's indulgence.

2 BY MR. DUNCAN:

3 Q One last question, sir.

4 Did you or have you seen the tabulation that Data  
5 Tab produced?

6 A Yes.

7 Q If you know, how did Data Tab identify which of  
8 the titles for it were BMI titles as opposed to other  
9 titles, if you know?

10 MR. KORMAN: Objection. It has not been shown  
11 that Data Tab did identify work as to whether they were  
12 BMI or something else.

13 MR. DUNCAN: I asked whether or not you had seen  
14 the tabulation produced by Data Tab.

15 BY MR. DUNCAN:

16 Q Have you seen the tabulation?

17 A Yes.

18 Q Does the tabulation identify work as being  
19 BMI work as opposed to other work?

20 A Yes.

21 Q If you know, how did Data Tab acquire that  
22 information?

23 A The identification was done by BMI employees.

24 Q To whom, sir, if you know?

25 A It was turned over to Data Tab to tabulate but the

1 identification was done in-house by those people at BMI or  
2 experts of identifying catalog.

3 MR. DUNCAN: I have no further questions at this  
4 time.

5 CHAIRMAN BRENNAN: Thank you, Mr. Duncan.

6 Mr. Cramer, in your view, what is the function of  
7 the Tribunal in this proceeding?

8 THE WITNESS: It is to allocate the royalties among  
9 those who are claimants, giving, as I understand it, primary  
10 consideration to performances.

11 CHAIRMAN BRENNAN: Are you acquainted with BMI's  
12 position in the 1978 distribution proceeding?

13 THE WITNESS: Oh, yes.

14 CHAIRMAN BRENNAN: Could you briefly summarize  
15 what was BMI's argument to us in that proceeding?

16 THE WITNESS: As I understand it, the contention  
17 was made that the Tribunal should distribute the royalties  
18 on cable based upon what local television stations had paid  
19 the respective claimants. Using the payment as a guide, that  
20 is local television payment as a guide, that should be  
21 the primary basis for the distribution. It was our position  
22 that the payment by local television for the Year 1978 did  
23 not truly reflect the shares or the contribution made by  
24 the claimants to local cable. That is because the amount  
25 paid to BMI and ASCAP for 1978 was based upon a formula that

1 went back many years and did not really reflect what was  
2 happening currently. So, we urged the Tribunal not to  
3 limit itself to those, to the financial information, but  
4 to look at the world that truly existed for that period of  
5 time.

6 Therefore, we presented data to show that BMI  
7 was far more important a factor than it had been 10 years  
8 prior when the television rates were negotiated.

9 CHAIRMAN BRENNAN: Why should we not apply this  
10 broad range of factors in this proceeding?

11 THE WITNESS: As I understand it, the Tribunal  
12 had previously determined that primary consideration but  
13 not exclusive consideration should be given to performances.

14 CHAIRMAN BRENNAN: I am acquainted with the  
15 Tribunal's position. I am asking you what your view is?

16 THE WITNESS: I am prepared to say if you want to  
17 go on the basis of our share of hits which more closely  
18 resembles performances or the performances I don't see any  
19 objection to that. I do object to using income as a  
20 criteria because that has no relevancy but that is an argument  
21 for counsel. If you want to determine what our share of  
22 hits are for the 1979 and base distribution on that, I  
23 would have no objection to that, Mr. Chairman.

1 CHAIRMAN BRENNAN: Have you read the summary of the  
2 testimonies of the ASCAP witnesses?

3 THE WITNESS: Yes.

4 CHAIRMAN BRENNAN: On page 4 of Dr. Fagan's state-  
5 ment, he requests that the Tribunal request of BMI and the  
6 other performing rights societies nonbroadcast, domestic  
7 collections for 1979.

8 Are you now in a position to give us that information  
9 for BMI?

10 THE WITNESS: I don't have it here with me. I would  
11 reiterate I think that is totally irrelevant information. I  
12 much prefer to give other data.

13 But if you want the data, it will be furnished to you.  
14 For the record, I don't have it with me.

15 CHAIRMAN BRENNAN: If you furnish it for the record,  
16 by all means please serve it on all counsel to this proceeding.

17 THE WITNESS: I am sure Mr. Duncan will do that.

18 CHAIRMAN BRENNAN: Turning now to Mr. David's testi-  
19 mony, page 3, Mr. David is comparing ASCAP and BMI and the  
20 following statement appears.

21 "BMI on the other hand is owned and run by and for  
22 the largest single group of music users, the broadcasters.

23 "As it's general counsel testified before you in the  
24 jukebox rate proceedings, no creator or publisher of music has  
25 anything to say about any fee BMI charges for the use of its

1 affiliate's property.

2 "Indeed, for the first 20, 25 years of it's existence  
3 BMI actually portrayed itself to users as a user organization  
4 rather than as it now tries to do as an organization somehow  
5 representing creators."

6 Would you care to comment on that statement?

7 THE WITNESS: In the first place, I think that has  
8 absolutely no relevance to what performances were on jukeboxe  
9 in 1979. None.

10 Leaving that aside, there are a number of comments  
11 contained within that quote that you read. The last part of  
12 it refers to a period of 20 to 25 years.

13 If my arithmetic is correct, he is talking about a  
14 period that ended in 1965. BMI was formed in 1940. So, what  
15 our activities were without arguing what they might have been  
16 prior to 1965 and what that has to do with our share of juke-  
17 box performances in 1979 I don't know.

18 The other observations that he made are argument.  
19 Again, I don't know what they are intended to prove. We do not  
20 run the company for the benefit of the users.

21 They are run for the benefit of writers and publish-  
22 ers. We are a nonprofit organization. We have been since the  
23 day we started. I am very proud of our operation.

24 We operate at the lowest overhead of almost any  
25 organization that I know. The money is turned over to writers



1 and publishers. ASCAP has raised this issue of broadcaster  
2 control for 30 years to my personal knowledge.

3 We have been before legislative bodies, administra-  
4 tive agencies. They brought anti trust cases in the courts,  
5 and they lost them all.

6 So, if they want to raise that here and if you want  
7 to have a full hearing on BMI's operation and whether it is so  
8 somehow illegal or effects our licensing, I am prepared to do  
9 it.

10 I respectfully suggest that that is really not the  
11 issue here. The issue is what took place on those jukeboxes in  
12 1979. If you want to go into the other one, I will go into it  
13 as great a length as you want to.

14 CHAIRMAN BRENNAN: If we turn to another paragraph on  
15 the same page of Mr. David's statement, he does get to juke-  
16 boxes.

17 "Since the 1976 law went into effect, ASCAP has  
18 brought over 130 lawsuits against infringing jukebox operators  
19 who have not complied with the law. I would be surprised if  
20 BMI brought one-tenth as many."

21 Would you care to comment on that paragraph?

22 THE WITNESS: Again, that is totally irrelevant to  
23 the issue as to what took place on those jukeboxes. Nowhere  
24 as I understand the statutory language or whatever this  
25 Tribunal has decided in the past has it been decided that a

rp4

1 distribution would be based on the number of lawsuits brought  
2 rather than some other criteria.

3 Again, the objection to the relevancy of that. Once  
4 you get beyond that, I think the fact that I assume it to be  
5 accurate that they brought 130 lawsuits, I don't know what  
6 that proves.

7 It certainly did not help bring about compliance  
8 with the act. If anything and I think the Tribunal knows better  
9 than any entity that the compliance has declined.

10 So, the 130 lawsuits assuming that number certainly  
11 did not help bring about that compliance. We did bring law-  
12 suits, but we did other things in addition to the lawsuits  
13 which to me have proved to be totally ineffectual.

14 For us to pile on lawsuits where they have had no  
15 or little effect is a waste of time, a waste of money and an  
16 abuse of the judicial system.

17 There are other things we have done and are doing  
18 now which I think will be more effective in getting compli-  
19 ance with the statute. I know that we are successful.

20 If you want to know, I will tell you what we are do-  
21 ing. Hopefully, they are more important, not the number of  
22 lawsuits.

23 COMMISSIONER GARCIA: I am curious to know if the  
24 Chairman has no problem with it.

25 THE WITNESS: Sure. I suppose I can say this. I

1 have felt that the only way you are going to get compliance is  
2 with the intervention of the government. Specifically, the  
3 Department of Justice.

4 Nobody takes these civil suits seriously. Now, 130  
5 civil suits produced nothing. Therefore, we are attempting to  
6 get criminal proceedings.

7 This is against those jukebox operators who have been  
8 in willful violation of the copyright law. I think that per-  
9 haps one or two of those will be worth far more than 130 or  
10 310 civil actions.

11 I was a little reluctant to discuss that because it  
12 is premature. But the matter is currently in the discussion  
13 stages. We are doing as much as we can to expedite criminal  
14 proceedings.

15 If we can, I think we will start to get some  
16 compliance.

17 CHAIRMAN BRENNAN: You testified that these civil  
18 suits perhaps may be counter productive. It has been suggest-  
19 ed that the Tribunal's location listing has also been counter  
20 productive and contributed to the compliance problem.

21 Have you a view on that?

22 THE WITNESS: No. I am not saying no. I just don't  
23 have a view.

24 CHAIRMAN BRENNAN: You testified in the cable dis-  
25 tribution proceeding concerning what you regarded as a rather

1 dramatic increase in use of BMI music by television during the  
2 '70s. With regard to jukebox performances, do you based upon  
3 your experience, see a similar dramatic switch or are these  
4 rather marginal increments?

5 THE WITNESS: Not the same switch. There are not  
6 the same fluctuation as we experienced in television. For the  
7 reasons that I discussed before the Tribunal, also.

8 If you will recall, I testified that BMI did not get  
9 into the area of supplying music for television and motion  
10 pictures until approximately 1961. That was not true in this  
11 other field.

12 There were no artificial restraints on us. Absent  
13 those artificial restraints, we started to do quite well. I  
14 don't see that there were any great fluctuation in the period  
15 in the ten-year interval. No.

16 CHAIRMAN BRENNAN: If we in this proceeding were to  
17 develop a reasonably good record concerning the performances  
18 and other relevant factors, would it be your view that it  
19 would be prudent to rely upon these figures for perhaps the  
20 next two or three years?

21 THE WITNESS: For jukebox?

22 CHAIRMAN BRENNAN: For jukebox.

23 THE WITNESS: Absolutely.

24 COMMISSIONER COULTER: Mr. Cramer, in response to a  
25 question by Commissioner Brennan, you indicated that there had

rp7  
1 that much change as far as you know in the relevant usage of  
2 BMI music and ASCAP over the last few years on jukeboxes.

3 Would you say that generally applies to music out-  
4 side the broadcast area?

5 THE WITNESS: Not really with respect to television  
6 or motion picture. Outside the jukebox area.

7 COMMISSIONER COULTER: Outside the broadcast area.

8 THE WITNESS: Probably. Well, maybe Broadway  
9 theater, there would be differences. In the other areas, I  
10 don't think there have been a great fluctuation in the past  
11 several years. I cannot exactly define it sitting here.

12 I would say in the last three or four years I cannot  
13 recall any major change discernible to me.

14 COMMISSIONER COULTER: Would it be correct to say the  
15 relationship has been approximately 50 percent or perhaps even  
16 more of BMI music?

17 THE WITNESS: I would have to guess. I think once  
18 you get outside the area of broadcasting and outside the area  
19 of jukebox for special reasons I come to jukeboxes, you are  
20 really more in an uncertain area.

21 To the best of my knowledge, there are no surveys of  
22 this other general area that you are talking about. I feel  
23 much more comfortable with jukeboxes.

24 Not because this is a jukebox hearing but because I  
25 think that jukebox performances are more closely related to

rp8

1 hit charts and radio performances. I am not sure of whether  
2 the same thing is in music used in hotels for example.

3 I hope that answers.

4 COMMISSIONER COULTER: Is hotel usage substantial or  
5 is radio the bulk?

6 THE WITNESS: Radio by far is the use of music.

7 COMMISSIONER COULTER: Outside broadcasting?

8 THE WITNESS: In broadcasting. Outside of radio and  
9 television the usage is bars, live music, discos, roller  
10 skating rinks, jukeboxes are in all those area.

11 We have no surveys for the other area except in juke-  
12 box. I am just guessing to answer your question.

13 COMMISSIONER COULTER: It is approximately 50 per-  
14 cent or you don't know?

15 THE WITNESS: If I have to guess, I would say at  
16 least 50 percent. That is just a guess.

17 COMMISSIONER COULTER: We have in as Commissioner  
18 Brennan alluded to it in the cable distribution proceeding  
19 parties suggest to us we make our determination upon a time  
20 factor and no other factor.

21 That is somewhat similar to what you are suggesting  
22 that we do here; is that correct?

23 THE WITNESS: No. What I am suggesting that we do  
24 here is to take the actual survey that was done by an inde-  
25 pendent agency. They counted. They did not know whether the

rp9

1 songs, plays that they listed were ASCAP, BMI, SESAC or any-  
2 thing else.

3 They had surveyors go out and just list what they  
4 heard.

5 COMMISSIONER BRENNAN: The number of performances  
6 equals time, doesn't it?

7 THE WITNESS: Well, you could if you translated it  
8 to say three minutes. Every play was three minutes, but you  
9 don't have to do that. You have the actual number of plays.

10 You don't have to do this working backwards. We say  
11 we know how many plays took place among those sample locations.  
12 This is a specific count. You don't have to estimate by taking  
13 time and dividing by three minutes.

14 To me, that is an unnecessary step. When you have  
15 the exact information, to me it is just going backwards to try  
16 to do it by time.

17 COMMISSIONER BRENNAN: I did not mean literally. I  
18 mean the number of performances being more or less time. An  
19 objective calculation.

20 It is not related to any other value or characteris-  
21 tics you might apply?

22 THE WITNESS: I would agree with that. Exactly.  
23 Three minute time intervals. Approximately three minute time  
24 intervals when a song si played.

25 We are saying these are how many three minute time

rp10

1 intervals we had. These are how many three minute intervals  
2 our competitors had, if you look at it that way.

3 COMMISSIONER COULTER: Continuing briefly. A ques-  
4 tion asked by Commissioner Brennan. I think ASCAP would claim  
5 that it receives more for its repertory than you do for a given  
6 repertory.

7 That introduces a different valuation. How would  
8 you suggest we deal with that?

9 THE WITNESS: Well, the fact that they may be paid  
10 for in another area ---

11 COMMISSIONER COULTER: In the same area. Outside of  
12 jukeboxes.

13 THE WITNESS: The fact that they might be paid more  
14 in a roller skating rink or in a night club seems to me to  
15 have no relevancy on what both organizations should be paid  
16 here where we are coming in for the first time.

17 We are asking this Tribunal to fix a rate. It is  
18 not arguable. I can't believe that it would be arguable that  
19 an ASCAP song is worth more than a BMI song.

20 There is no qualitative difference being urged on  
21 this Tribunal. They are not saying in effect we go into a  
22 jukebox, you put 30 cents in if it is ASCAP and a quarter if  
23 it is BMI.

24 Leaving aside the question whether or not there are  
25 inherent differences in a value of a particular song because



rp11

1 one happens to have an ASCAP label and one happens to have BMI.

2 The fairest distribution is to say not what somebody  
3 else paid under a contract five years ago for use of music in  
4 roller skating rinks, but this Tribunal is fixing it now for  
5 the first time.

6 Otherwise you get involved in a cycle. You get more  
7 because somebody else paid more, and the Tribunal says you get  
8 more.

9 You people have an opportunity to go into an area  
10 completely fresh. Look at it and say this is what was played.  
11 This is an amount of money. ASCAP has so much. BMI has so  
12 much.

13 That is how we are going to break up the pie. As  
14 far as BMI songs are concerned, nobody can tell me that one  
15 organization should be compensated more for its thousand plays  
16 than the other got for its thousand plays.

17 I don't mean to be argumentative. If it shows each  
18 one, each organization had 1,000 three minute segments, how  
19 should one get more for its 1,000 three minute segments than  
20 the other should get for its 1,000 three minute segments?

21 To me, it is not far, but it is not logical.

22 COMMISSIONER COULTER: How come ASCAP gets more in a  
23 roller rink than BMI, outside the broadcast area?

24 THE WITNESS: First, they had a longer history than  
25 we had of dealing. What we are trying to do now is bring the

rp12

1 rates up as we demonstrated before on cable. We brought our  
2 rates closer to radio where they are practically identical  
3 now.

4 We started far behind. We are bringing our rates up  
5 in this area. I hope that the rates paid will more accurately  
6 reflect our contribution.

7 If we started from scratch, both of us went in to-  
8 gether, we would do a hell of a lot better than we are doing  
9 now. That is what we are doing here.

10 We are starting from scratch. We are saying, we are  
11 asking the Tribunal pay according to our allocation to the  
12 jukeboxes for that particular time.

13 COMMISSIONER COULTER: Thank you very much.

14 CHAIRMAN BRENNAN: Commissioner Burg.

15 COMMISSIONER BURG: Mr. Cramer, in your selection  
16 process, how many survey institutions or organizations did  
17 BMI interview before it selected ORC?

18 THE WITNESS: We looked at several. I looked at  
19 fromal written presentations. I only interviewed one, ORC.  
20 Others had made written presentations to us.

21 COMMISSIONER BURG: Am I to assume from that  
22 fact that you only interview one that that was in the final  
23 phase of the selection? Someone had already narrowed the  
24 field before you got to ORC?

25 THE WITNESS: I looked at and discussed the

etp22  
1 recommendations. Based upon what I saw, I wanted to inter-  
2 view ~~that~~ one. If I was not impressed with the personnel  
3 I would have gone somewhere else. But we had time  
4 restraints. On the basis of that interview, I decided  
5 they could do the job and do it well.

6 I was not going any further I said, let's go.  
7 Start tomorrow.

8 CHAIRMAN BURG: Prior to the selection of ORC when  
9 at least at some point other organizations were being  
10 considered, did any of them or for that matter, did ORC  
11 have any reservations or any questions about the survey  
12 that you wanted done in terms of the validity of it, the  
13 number of the sample, the sensitive nature of the sample?

14 Was any reservation expressed at all that perhaps  
15 you did not have enough information to do what you wanted  
16 done?

17 THE WITNESS: Not to my knowledge. It was never  
18 expressed to me. If they had, I assume they would not  
19 have done it. When the representative from ORC testifies,  
20 you can ask her. To my knowledge, they had no reservations  
21 whatsoever.

22 COMMISSIONER BURG: Mr. Cramer, on page two of  
23 Dr. Fagan's statement in two areas in the first paragraph on  
24 the page and towards the bottom of the second paragraph he  
25 is talking about the ownership of many boxes cannot be

etp23

1 established by examining the machines, cannot be determined  
2 from the face of the jukebox whether or not it is licensed.  
3 Therefore, we have no way of determining without great  
4 difficulty and expense who owns particular boxes as  
5 whether they are licensed.

6 Is that a valid arugment in your view whether  
7 the boxes are licensed or not or whether or not you know who  
8 owns the boxes in terms of what you are trying to do does?

9 THE WITNESS: For this survey, absolutely not.  
10 If you walked into a place where a jukebox is played and you  
11 wear blindfolds, I defy anybody to tell me whether it was  
12 from a licesed jukebox or an unlicensed jukebox. It is  
13 not possible to tell me listening whether it is licensed  
14 or not. Maybe for other purposes it has validity but  
15 it certainly does not in any view effect the results that  
16 we present to this Tribunal.

17 COMMISSIONER BURG: In that second paragraph of  
18 Dr. Fagan's statement, he says the Tribunal's list contained  
19 the locations of some 24,000 jukeboxes out of 140,000 which  
20 have been licensed.

21 Again, this gets to what I was asking previously.  
22 Thus, a simple request can be drawn which would be valid  
23 only for those jukeboxes. I presume they mean only for the  
24 24,000 some odd and not for the universe of all licensed  
25 jukeboxes. You do not think that is relevant to this

etp24

1 proceeding?

2 THE WITNESS: In the best of all worlds with lots  
3 of time and nothing else to do, I suppose it would be  
4 better theoretically, perhaps, better to say, okay. We  
5 will just sample licensed jukeboxes. But in my view, it  
6 would not have any different result. It would be far  
7 more costly.

8 It would have taken us a lot more time. I  
9 repeat. I don't think there is any evidence that can be  
10 introduced which will show there is a difference between  
11 what goes out over a licensed jukebox and a non-licensed  
12 jukebox.

13 If it could, it would make it a lot easier. You  
14 would go into a new establishment. You would not have to  
15 look at the machine to see whether it is licensed. You  
16 could listen. Nobody can do that. You have to look for  
17 that sticker.

18 There is really no difference as far as I know.  
19 For the purpose of this hearing and evaluating performances,  
20 we did a bigger job. We showed no difference.

21 COMMISSIONER BURG: Did ORC or any of the other  
22 organizations that you might have considered or indeed  
23 did consider, have any question about the validity of doing  
24 a survey of music performed in jukeboxes in 1981, which  
25 would be used for 1979 purposes?

etp25

1 THE WITNESS: I did not discuss this survey or any  
2 other organization other than with ORC. Whatever results  
3 would be arrived at after their summary, that was a matter  
4 for argument by counsel before this Tribunal.

5 They did not, in other words, they were asked to  
6 go out and do this survey. That is what they did. How we  
7 used it is up to counsel when it is presented to you. They  
8 may have opinions about that.

9 I have opinions about it. They had, they were  
10 just to go in and do the survey. Do it accurately, objective-  
11 ly. Whatever the results are, let them go.

12 COMMISSIONER BURG: I guess the next question almost  
13 begs itself. In 1979, you did not consider doing a survey?

14 THE WITNESS: Well, it was considered. We did  
15 not do it.

16 COMMISSIONER BURG: May I ask why you did not do  
17 it?

18 THE WITNESS: Well, I think we took the position  
19 before the Tribunal, consistently took the position that it  
20 is theoretically the best to do the survey. It was too  
21 expensive to do. We were hopeful that the Tribunal would  
22 accept other evidence which would show performances, not  
23 income, not all the other stuff; no lawsuits that we  
24 brought, not on income from rollerskating ring or whatever  
25 but on performances. We thought, and I still do think, that

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rp 13

1 there are other areas which show a closer correlation between  
2 performances on jukeboxes which would not require the necess-  
3 ity of these surveys. Trade charts and others.

4 So, we did not do it. That is why we did not do it  
5 in '79. I think we took that position consistently before you  
6 in '79.

7 But when it was apparent that we were going to have  
8 this hearing, I decided to do it for '81. We would argue be-  
9 fore you the consequences of that study and what the relevancy  
10 was to '79.

11 That I think counsel will do.

12 COMMISSIONER BURG: Not having the legal mind, Mr.  
13 Cramer, I can't help but be a little confused. This law was  
14 signed in '76 and went into effect in 1978. Perhaps forward  
15 looking decisions might have been made at that time.

16 In the 1981, we might be talking about a survey done  
17 in 1979. Short of that, we might just recess all of these  
18 developments and do 1982, the results of the 1981 survey.

19 THE WITNESS: I don't think there is a significant  
20 difference what was played in '81 and what was played in '79.  
21 You can't turn the clock back and do '79.

22 We try to do the next best thing. The next best  
23 thing, not as good as it had been done in '79 was to do what we  
24 do. In the future we might have to do it currently.

25 Also, we had worked out an agreement for the year

1 '78. I am not attributing blame to either side, but I was  
2 hopeful, and I think both sides was hopeful, ASCAP and BMI,  
3 wanted to make an arrangement for 1979 which would save every-  
4 body time and trouble.

5 We just did not do it. If we had, we would not need  
6 the survey. After these hearings, the guidelines will be a  
7 lot clearer.

8 Maybe we will be able to convince the Tribunal that  
9 there is evidence other than the survey which would be accept-  
10 able to you in the future.

11 COMMISSIONER BURG: Thank you, Mr. Cramer. I hope  
12 when Miss Kilkenny takes the stand she might anticipate that  
13 I am still interested in pursuing some of these questions.

14 CHAIRMAN BRENNAN: Commissioner Garcia.

15 COMMISSIONER GARCIA: Mr. Cramer, earlier both under  
16 questioning from Commissioner Brennan and Coulter, you indi-  
17 cated that you did not think that income as a criteria was  
18 relevant.

19 You want to expand your views more on that?

20 THE WITNESS: As I understand it, we are here to de-  
21 cide how to distribute a pot that was collected from jukeboxes  
22 for the year 1979.

23 I will give you the same illustration I gave before.  
24 If both organizations had 1,000 plays on the jukebox. The pots  
25 were the same.



1 Here we had a thousand and here our principal com-  
2 petitor had a thousand. If that is the fact, assume that for  
3 the moment, what difference does it make in distributing that  
4 money whether local television paid ASCAP and BMI less?

5 I think it has no relevancy on how this Tribunal is  
6 going to decide. If they are equal, they should be divided  
7 equally.

8 Some of the performances and the income, we are not  
9 dealing with income. We are dealing with performances. I find  
10 no statutory criteria saying you should distribute on the basis  
11 of income.

12 It makes no sense to me, Commissioner, to say if I  
13 have got a performance and my competitor has a performance the  
14 fact that a television station pays them more money, we should  
15 have a different distribution of income.

16 It is illogical and inequitable. A Tribunal is go-  
17 ing to give you less because you were a BMI being as opposed to  
18 ASCAP.

19 If you have the same amount of performances, you  
20 should get the same amount of money.

21 COMMISSIONER GARCIA: On Commissioner Burg's concern-  
22 ing the survey done on '81 performances as opposed to '79 per-  
23 formances may not have the evidence in, would you not think that  
24 the '79 revenues would be a better analogy or better review.

25 Dr. Fagan and his statement suggests two and one is a

1 '79 license for a revenue of claimants and also the amount of  
2 the claimants charged and collected for '79, performances of  
3 plays such as jukeboxes would be located.

4 THE WITNESS: I don't think what a television sta-  
5 tion paid has anything to do with this. We are saying we did  
6 not have a survey for '79, but our current survey will not  
7 materially differ from what took place in '79. It really  
8 would not.

9 If it is reasonably accurate -- Our survey is accu-  
10 rate. Unless someone can say that this does not reflect what  
11 took place in '79, it should be used.

12 Let me go back a moment. Dr. Fagan's argument is as  
13 illogical in his presentation as if we had the 1979 data. He  
14 would make the same argument, and it would be equally illogi-  
15 cal.

16 His argument is not based on the fact we did not have  
17 data for '79. That is not his argument.

18 MR. KORMAN: I object to the characterization of Dr.  
19 Fagan's statement.

20 THE WITNESS: The logic of their presentation is you  
21 should distribute it on the basis of income in other areas.  
22 You have heard my discussion. We both have performances.

23 One in jukeboxes, and you are starting fresh. We  
24 have evidence of what performances are. Why should that be  
25 given weight instead of what a television station pays?

rp17

1           What a television station pays does not reflect what  
2 performances are on television.

3           COMMISSIONER GARCIA: Forget about television. What  
4 about a lounge in a hotel? The fact if that particular loca-  
5 tion did not have a jukebox and it was strictly on license,  
6 BMI and ASCAP license from what you have testified, wouldn't  
7 then in fact the ASCAP share be higher because their license  
8 fees would be higher than what BMI would be charging for that  
9 same location if it were not for a jukebox?

10          THE WITNESS: I don't understand that, Commissioner.  
11 I don't understand that at all.

12          COMMISSIONER GARCIA: What is it you don't under-  
13 stand, the question or the logic behind it?

14          THE WITNESS: If you would repeat the question, or  
15 I did not understand the logic behind it. I am saying assum-  
16 ing we have a survey for '79 and the lounge is paying more for  
17 ASCAP than BMI would you pay ASCAP more even on the basis of a  
18 '79 survey?

19          Suppose we actually had the survey. Suppose we had  
20 the '79 survey and the '79 survey showed more BMI music played  
21 than ASCAP.

22          Would the Tribunal say we should pay more because the  
23 lounge paid ASCAP more for its other use of music?

24          COMMISSIONER GARCIA: Using the question that you  
25 are asking me, say 1981, it does not matter from what you have

1 testified or what I understand you to say. Today the license  
2 fees for ASCAP are higher than BMI.

3 I am not concerned in the year this is taking place  
4 as much as the use of income as a criteria for the basis.  
5 That is why I am asking you the question from that point of  
6 view.

7 THE WITNESS: I can only restate it again. Suppose  
8 we had or suppose we dealt with the '81 survey talking about  
9 the distribution for '81?

10 We come in with an '81 survey. Would you then say  
11 that even though the 1981 survey shows that BMI has more music  
12 than ASCAP on jukeboxes we are going to pay ASCAP more because  
13 lounges pay more? I don't see that.

14 It is not only illogical, but unfair. The people's  
15 whose music, who are contributing to this have contributed  
16 more music.

17 In 1981 if our survey is valid for 1981, why would  
18 you distribute the 1981 income based upon jukebox income based  
19 on what other users were paying in '81?

20 COMMISSIONER GARCIA: Don't you think in your anal-  
21 ogy that we are penalizing ASCAP for the fact that they do  
22 have the higher fees?

23 If we do go by performance in taking the '81 and  
24 referring to '79, that is actually penalizing the members of  
25 ASCAP?

1 THE WITNESS: Not at all. Just the other way  
2 around. If you do it on income, you say to people who pro-  
3 duced 56 percent of the jukeboxes you are not entitled to your  
4 share of that pot because in a totally unrelated area BMI  
5 got less than ASCAP.

6 My understanding is that this Tribunal is to consid-  
7 er this problem fresh. You have a pot of money. What is the  
8 best way to distribute it?

9 To say we are going to distribute that assuming our  
10 figures are correct based upon other criteria penalizes those  
11 people who contributed to that pot. I don't know how to  
12 answer it.

13 CHAIRMAN BRENNAN: We will take a short recess.

14 (A short recess was taken.)  
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CHAIRMAN BRENNAN: Commissioner Garcia.

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COMMISSIONER GARCIA: Thank you.

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Mr. Cramer, I was looking over my notes and thinking this over. It appeared to me towards the end we were getting argumentative with each other. That was not my purpose. There were just a couple of points of views that I was trying to make. Having read your statements and previous comments you were making to other commissioners in previous hearings. A couple of things. I feel like that break came at an inopportune time because it is hard to get this back on the track. There are some things I want to follow-up with you on. You talked about BMI in essence contracts are coming due and negotiating. You are also increasing your fee structure. Did I understand that properly?

MR. CRAMER: I hope so. I hope I'm successful in doing that.

COMMISSIONER GARCIA: I'm saying to get it more comparative with ASCAP?

MR. CRAMER: Well, in those areas where I think we are entitled to more, I'm going to ask for more.

COMMISSIONER GARCIA: The point I'm making, Mr. Cramer, is I have heard you on several occasions say ASCAP over the years has been more successful because they have been at it longer. You are trying to play catch up. It has also appeared to me, it seems, the opposite would have

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1 been true. I would think that would have been a help to you.  
2 The fact their fees were higher to try to raise your own fees  
3 at BMI, I'm pushing all of this because I want to get your  
4 views on income criteria. Not having heard the evidence yet  
5 on the survey in previous hearings, I lean that way towards  
6 the market place analogies of income being the basis for  
7 direct examination.

8 MR. CRAMER: I can understand that and I did not  
9 mean to be argumentative, either. I would make a correction.

10 I didn't say that ASCAP is more successful than  
11 we are. I think we are more successful. Our income has not  
12 yet caught up with our success. With that minor change in  
13 the question, the problem that we face here is, well let  
14 me try to analogize it again. I assume for the year 1979  
15 there were just two performances on jukeboxes. ASCAP won,  
16 BMI won. So, to make the theoretical question easy in my  
17 opinion the criteria would require that jukebox pot be  
18 divided 50-50.

19 Regardless of what income might have been for these  
20 organizations in other areas. So, if we had just two perfor-  
21 mances I would walk away with half and Mr. David of ASCAP  
22 would walk away with half the pot. That is really all we are  
23 talking about here. Whether or not we can prove instead of  
24 one we had so many. Instead of their one they had so many  
25 others, that we are prepared to do. But the theoretical

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1 question you raise seems to me can be focused on by simply  
2 viewing it as we had one and they had one. Or if we had two  
3 and they had one or if they had two and we had one, it would  
4 be a simple problem. These others are irrevelant. I don't  
5 think the problem becomes more complex because it is more  
6 complex than one and one and two and one.

7 COMMISSIONER GARCIA: Thank you.

8 CHAIRMAN BRENNAN: Thank you.

9 Each complainant has equal rights with regard to  
10 cross examination. Unless there is an objection on the part  
11 of SESAC or Italian Book, I think it would expedite the  
12 proceedings if I were to call upon the larger society be of  
13 the two smaller societies.

14 MR. CIANCIMINO: We have no objections.

15 CHAIRMAN BRENNAN: I call on Mr. Korman

16 CROSS-EXAMINATION

17 BY MR. KORMAN:

18 Q Mr. Cramer, I believe through inadvertance you  
19 mischaracterized Dr. Fagan's statement. The first couple  
20 of pages have it Dr. Fagan states ASCAP's view. Were it  
21 possible it would be best to determine each claimant's share  
22 of these royalties on the basis of the census or absent that  
23 possibility a valid sample. It is only because of ASCAP's  
24 conclusion that it is not possible to proceed that way that  
25 we have suggested some analogies.



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1 I would like to ask you for the moment to accept  
2 the assumption that the survey on which BMI is relying will  
3 not be accepted by the Tribunal.

4 MR. DUNCAN: I would have to object to that. We  
5 are here to determine that question. I don't think it is  
6 fair to have the witness to assume contrary to what we are  
7 seeking.

8 CHAIRMAN BRENNAN: I'm going to overrule primarily  
9 because of the questions asked by Commissioners.

10 MR. KORMAN: The Commissioners are interested in  
11 why ASCAP collects more than BMI.

12 BY MR. KORMAN:

13 Q Mr. Cramer would you tell us what BMI's product is?  
14 What does BMI sell to its licensees?

15 A The right of public performance.

16 Q Of a specific composition or of a catalog, a  
17 repertoire.

18 A It depends. Most times it is repertory. It could  
19 be.

20 Q How much revenue is derived from sales other than  
21 your repertory?

22 A A very small amount. You ask me what we do  
23 license. What we do license is the right of public perfor-  
24 mance.

25 Q Of the right of the entire repertory with minor  
exceptions?

5  
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1 A Yes.

2 Q ASCAP is basically the same, except it is a different  
3 repertory?

4 A Yes.

5 Q The reason users pay more to ASCAP than BMI is  
6 because they view a right of SESAC to the right of ASCAP as  
7 a more valuable right that right deemed by them to be more  
8 valuable?

9 A No.

10 Q Why then does ASCAP collect more in your opinion?

11 A Maybe they have better representatives at the  
12 bargain table. I don't know. In some areas it is historical.

13 Q Look at radio. You have the same rights in radio  
14 almost you say. Mr. Cramer, when was the last time BMI  
15 negotiated with radio broadcasters?

16 A I really don't recall. I just did not refresh my  
17 recollection before coming here. I don't know when that was.

18 Q If I suggest to you it was approximately 78 or 79  
19 would that sound right to you?

20 A It was not 79.

21 Q Was it 78?

22 A I don't think so, but I'm not sure. I'm very vague.

23 Q The ASCAP contract ran out December 31, 1977. My  
24 recollections is BMI contracts ran out the same time. Was  
25 there an increase negotiated then or was the rate kept the  
same?

6  
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1 A As a matter of fact, it was an increase from.

2 Q Would you describe it, please?

3 A Yes.

4 Q What was the prior rate and the rate agreed on let  
5 us assume and subjector corrections that it was in 1978?

6 A I have to go back. I have to put this in perspec-  
7 tive to see where the rates came from. I recall when I  
8 started to negotiate several years ago, the ASCAP rate was  
9 two percent and the BMI rate was 1.2 percent. Two percent  
10 for ASCAP 1.2.

11 Q Excuse me. Approximately when would you say that  
12 was?

13 A About ten years ago. I don't really remember the  
14 date.

15 Gradually over a period of years the ASCAP rate  
16 dropped from two to 1.725. BMI's went from 1.2 to 1.7. In  
17 the last year of the prior contract under an experimental  
18 formula it dropped from 1.7 because of the new formula to  
19 something like 1.6, I believe.

20 So when it was renegotiated it went up to 1.7. That  
21 is the best of my recollection now. I don't know.

22 Q Wasn't the original BMI rate in 1940 1.2 percent?

23 A I was not there in 1940. I really don't know.

24 Q You have negotiated those contracts?

25 A I did not negotiate that rate.

7

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1 The radio contracts were negotiated by you for the  
2 radio industry for the past, how long Mr. Cramer?

3 A Ten or 11 years.

4 Q Did you represent BMI as counsel in the mid 60's  
5 when the government brought in anti-trust suit claiming  
6 monopolization of the market?

7 A I represented BMI, but I can't accept because I  
8 don't know what the characterization of the governments  
9 complaint. I don't know what the language of the complaint  
10 said now 17 years after it was brought. I know what the basis  
11 of the complaint was. It was not that.

12 Q It was the broadcasting owning BMI had achieved that  
13 result?

14 A No.

15 Q Would you tell us what it was?

16 A I have a problem here of how much of my activity  
17 prior to '68 or '69 is preferred.

18 I would like to confer with counsel on that  
19 because it is relevant in another connection.

20 CHAIRMAN BRENNAN: All right.

21 COMMISSIONER BURG: Mr. Korman you keep your voice  
22 up, please.

23 MR. DUNCAN: I'm advised by Mr. Cramer there is  
24 presently pending in the Southern District of New York an  
25 action in which ASCAP and BMI are defendants. One of the

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1 issues in that case touches on the question Mr. Cramer's  
2 role prior to a certain date, the dates here being inquired  
3 about. It is on that basis that Mr. Cramer would assert a  
4 privilege not to answer the question. It does involve the  
5 outcome of pending litigation. I suggest to the Tribunal if  
6 Mr. Korman wishes to pursue this line of questioning, if he  
7 would submit written questions confined to this point, we would  
8 try to answer them in a way it is appropriate in view of the  
9 fact litigation is pending.

10 CHAIRMAN BRENNAN: Mr. Korman, what is your reaction  
11 to the suggestions?

12 MR. KORMAN: I don't think it would be necessary  
13 to proceed along the lines to the point of written questions  
14 be submitted.

15 BY MR. KORMAN:

16 Q Mr. Cramer do you recall that in 1960 at the time  
17 this government lawsuit was brought BMI's share of the trust  
18 was up 80 share of the charts was in excess of 80 percent.

19 There are times in the past and now when sometimes  
20 our share is that high. It was that high and sometimes it is.

21 Q Consistently so in the early 60's. It has not been  
22 consistently so for a long time.

23 A I have no pre-recollection of our position on the  
24 charts 15 or 16 years ago, but I knew we did reasonably well.  
25 I can't tell you whether it was 70 or 60 or 80 percent. I'm

9

1 totally unprepared for that for this proceeding.

2 Q Didn't BMI take the position Mr. Cramer, by way of  
3 a letter from Sidney Kaye to the government that charts don't  
4 reflect performances?

5 A It could have at that particular time.

6 Q Does BMI still take that position?

7 A In some areas charts reflect performances and some  
8 they don't.

9 Q Which are which?

10 A Well, certainly charts in Replay magazines which  
11 is the Jukebox magazine don't go to performances on tele-  
12 vision. So, I can't give you a general answer.

13 Q No. Mr. Cramer, does any chart purport to reflect  
14 performances only?

15 A The question is only -- the answer is not to the  
16 best of my knowledge.

17 Q My associate Mr. Koenigsberg is handing you a copy  
18 of a letter March 17, 1978 addressed to you from a BMI  
19 affiliate, Delmas K. Bach and a copy of a response to that  
20 letter, dated April 6, 1978, signed Theodora Zavín, Senior  
21 Vice President of BMI. Have you seen this correspondence  
22 before, Mr. Cramer?

23 A Yes.

24 Q For the benefit of the Tribunal to save time in  
25 reading, I'm calling attention to what is labeled in the

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1 incoming letter of March 16th experience one which relates to  
2 a work is position 70 on the chart and received no money from  
3 BMI.

4 Mrs. Zavin's response which is paragraph numbered  
5 one which she writes "The trade paper charts reflect record  
6 sales and may sometimes reflect records shipped by the  
7 recording company rather than records sold. The charts do  
8 not reflect performances activity." And the paragraph goes  
9 on. Does that statement accurately represent the BMI view?

10 A Yes.

11 MR. KORMAN: I move that these letters be admitted  
12 into evidence and marked as ASCAP Exhibit 1 collectively.

13 CHAIRMAN BRENNAN: I believe Chairman James  
14 instructions.

15 MR. DUNCAN: We have no objections.

16 (The document referred to as  
17 Exhibit A was marked for  
18 identification.)

19 BY KORMAN:

20 Q You attended only one meeting with ORC but there  
21 were many such meetings. Who representing BMI was present  
22 at the other meetings?

23 A I'm not sure.

24 Q Who would know, Mr. Cramer?

25 A I believe -- but again I did not participate after  
that first meeting when I said in essence you are on your own.

11

1 I think Dr. Link.

2 Q Anyone on the BMI staff?

3 A I don't know.

4 Q Does BMI have in-house survey experts?

5 A Well, I don't know how you would characterize  
6 Dr. Richard Link. He's a consultant to us. He's not an  
7 employee at BMI. As a consultant if you mean that is in-  
8 house, I would say Dr. Link qualified in my view as an expert.

9 Q I know about Dr. Link. I am asking if there are  
10 any other BMI employees who -- let's not use the word survey  
11 expert but lets speak of someone who knows something about  
12 surveys and who was present at the meeting?

13 A I indicated I did not know who was present at the  
14 meetings. There may have been others. I don't know Dr. Link  
15 I would assume would have been present.

16 Q Dr. Link will be here tomorrow. Dr. Cramer did  
17 BMI conduct any survey of jukebox performances other than  
18 the one referred to here?

19 A No.

20 Q Including any in-house survey?

21 A BMI conducted no other survey of jukeboxes whether  
22 in-house or by any other outside people. This was the first  
23 and only one I'm aware of. I would have been aware of it.

24 Q Did you consult with CRT concerning the survey?

25 A I personally?



12

1 Q Yes.

2 A I, personally, did not consider that. I know that  
3 a letter was sent to the Tribunal in March. I believe that  
4 possibility of a survey was discussed with the Tribunal prior  
5 to that time. I was not personally involved. That was  
6 handled by counsel.

7 Q Were you aware of the interest the Tribunal expressed  
8 in being a party to the survey in the AMOA situation?

9 MR. DUNCAN: I'm going to object to that. I'm  
10 not sure that is an accurate reflection of what happened. I'm  
11 sure the Tribunal expressed an interest in a survey but being  
12 a party to the survey I don't remember that.

13 CHAIRMAN BRENNAN: I'm going to overrule the  
14 objection.

15 THE WITNESS: Would the reporter please read the  
16 question back to me?

17 (Read back.)

18 CHAIRMAN BRENNAN: Mr. Korman, by party you mean  
19 input?

20 MR. KORMAN: Yes. Thank you, Mr. Chairman.

21 THE WITNESS: I'm not aware of that detail.

22 BY MR. KORMAN:

23 Q I realize, Mr. Cramer, that president life is in  
24 varied atmospheres and I understand why you may not be  
25 familiar.

13

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1 Q Did you know there does not seem to be an indication  
2 as to whether the jukeboxes surveyed were or were not licensed  
3 jukeboxes?

4 A Does not seem to be any indication? Is that the  
5 question?

6 Q Yes. I don't believe the survey results indicate  
7 nor any box whether it is a licensed box or not. Is that  
8 correct?

9 A That's probably correct.

10 Q Did you consider having that information reported  
11 along with other information by the people who were making the  
12 investigations?

13 A I believe I testified earlier that I did not think  
14 there was any difference in the performances that took place  
15 on licensed or unlicensed jukeboxes.

16 Q What is the basis for your conclusion? Do you have  
17 a fact on which that's based or is that just a guess?

18 A I cannot tell nor does anyone I know discussed  
19 with me could they tell me walking into an establishment that  
20 had a jukebox playing if they were to stand there and listen  
21 to the jukebox whether that music was coming from a licensed  
22 jukebox or unlicensed jukebox.

23 Q I understand that. That was not my question.

24 A Based on my observation and just general discussions  
25 with people who look at that, for this purpose we were unable

14

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1 to know any difference.

2 Q Now, can I have an answer to the question? Is  
3 there a factual basis for your conclusion that there is no  
4 difference between the performances of licensed and unlicensed  
5 boxes?

6 A I answered that to the best of my knowledge.

7 Q Are you aware, Mr. Cramer, that statute and  
8 referring you to Section 116 C5 provides that Tribunal the  
9 access regulation provision shall promulgate regulations and  
10 so forth concerning claimants having access to phono records  
11 an opportunity to obtain information with respect thereto as  
12 may be reasonably necessary to determine by sampling pro-  
13 cedures or otherwise the proportion of contracts of the  
14 musical works of such person to the earnings of the phono  
15 record players for which fees shall have been deposited.

16 My question is, Mr. Cramer, are you aware that's  
17 the provision of the law?

18 A Yes.

19 Q The law draws a distinction between licensed and  
20 unlicensed jukeboxes? Are you aware of that?

21 MR. DUNCAN: Can the witness answer that. Mr. Korman  
22 I'm sorry. I thought that was answered.

23 THE WITNESS: I understand there are many differences  
24 between licensed and unlicensed jukeboxes.

25 BY MR. KORMAN:

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1 Q And that the law makes a distinction with respect  
2 to what the Tribunal's job is; is that right?

3 MR. DUNCAN: Your Honor, I don't want to keep ob-  
4 jecting, but I do think now the counsel is arguing law with  
5 the witness. He can answer it, but it is just not a proper  
6 question.

7 CHAIRMAN BRENNAN: Mr. Cramer, do you want to?

8 THE WITNESS: If you direct me to answer, I will  
9 answer. I understood I was a witness here to testify to fact  
10 and not get involved in legal questions.

11 CHAIRMAN BRENNAN: The questions that the commis-  
12 sioners asked I indulged, but I think, Mr. Korman, you are  
13 getting into legal argument. You will have your opportunity  
14 in due course.

15 BY MR. KORMAN:

16 Q If the survey distinguished between licenses and  
17 unlicensed jukeboxes, then an analyses might have been made  
18 which would have shown a correlation or lack of correlation  
19 between BMI or ASCAP or any other share of performances of  
20 licenses against licnesed or unlicenses jukeboxes.

21 Would you agree with that statement?

22 A As I understand the question, if we had gone through  
23 the trouble and expense and delay of trying to find out what  
24 performances were on licnese ---

25 Q Forgive me. Let me interrupt you. Let me restate

1 my question.

2 MR. DUNCAN: Your Honor, I am going to object to  
3 that. I suspect Mr. Korman did not like what he was going to  
4 hear.

5 MR. KORMAN: No.

6 BY MR. KORMAN:

7 Q You may proceed, Mr. Cramer.

8 A If you are asking me whether if we had done a survey  
9 of licensed and unlicensed jukeboxes ---

10 Q I am going to interrupt you, Mr. Cramer. What I am  
11 saying is this, and forget the prior question.

12 Suppose going to exactly the same places and you are  
13 familiar are you not with the instructions given to the  
14 enumerators, Mr. Cramer?

15 A I read them after the fact.

16 Q They were instructed were they not to walk up to the  
17 jukebox and see which record was being played and write down  
18 the number if the jukebox showed it of the record being played;  
19 is that not correct?

20 A Those were part of the instructions that were given.  
21 I did not really study those instructions. I did not see them  
22 until long after this study was completed. I did not approve  
23 or disapprove or have anything to do with those instructions.

24 CHAIRMAN BRENNAN: There are several precedents in  
25 previous proceedings in which the Chair has sustained

rp 22

1 objections to detailed questions addressed to chief executives.

2 The Chair will recognize the fact that Dr. Cramer  
3 did not conduct the survey.

4 MR. KORMAN: The point I am getting at is a simple  
5 one.

6 BY MR. KORMAN:

7 Q Assume with me Mr. Cramer that I am correct in stat-  
8 ing that the people who did the investigating did go up close  
9 to the jukebox many times while they were present as often as  
10 works were being performed so they could check the number of  
11 the composition.

12 At least they were so instructed. That is that was  
13 being played. If a jukebox were licensed, it would have been  
14 a simple thing and no additional cost at all to have had the  
15 enumerator make note of the fact that the box did or did not  
16 have the certificate; is that not true?

17 A Not necessarily true.

18 Q Tell me why.

19 A I have become very conscious of jukeboxes and cer-  
20 tificates recently. So, I look; and very frequently it is  
21 difficult to find whether the box is or is not licensed merely  
22 because it does not have a certificate.

23 It may be someplace else. It sometimes is stuck on  
24 the back. It is not always easy to find it. You have to in  
25 some instances be pretty conspicuous to go look for it. It

rp 23

1 is not as simple as looking at the box to see whether it has  
2 a certificate on there.

3 In theory, it sounds nice, but in practice it is not  
4 always that easy.

5 Q Mr. Cramer, does BMI survey performance in media other  
6 than jukeboxes?

7 A Yes.

8 Q In which media does BMI survey performances?

9 A Primarily in broadcasting.

10 Q Any others?

11 A Well, in concert performances. Our concert depart-  
12 ment. It is not pop music. It is the music performed by  
13 symphonies. In that, we do a survey.

14 That is a rather limited area. Other than that it  
15 is broadcasting.

16 Q Do you survey background performing music like  
17 MUSAK?

18 A No.

19 Q Speaking of equalizing rate, the MUSAK rate for BMI  
20 is \$5 a month versus the ASCAP rate of \$27 a month; is that  
21 correct?

22 A The current rate is under negotiation is.

23 Q What are you being paid?

24 A I do not now recall because I know the matter is  
25 undernegotiation.

rp 24

1 Q When BMI surveys, are you familiar with the general  
2 nature of the survey made?

3 Pick one. Radio. Are you familiar with the way  
4 BMI surveys radio?

5 A In general terms, yes.

6 Q Could you give us a brief description of the  
7 principles of that survey?

8 A A sample is selected.

9 Q By whom?

10 A Basically, the sample is selected by the outside  
11 auditing firm. Ernst and Whinney. Ernst and Whinney sends  
12 to let's say a hundred stations a request for those stations  
13 to log at a specific interval of time the station's using  
14 forms sent to them by Ernst and Whinney.

15 We write down, they are instructed to write down  
16 whatever music is played on their radio station let's say  
17 for this week.

18 They are not to distinguish whether it is BMI music  
19 or music licensed by anyone else. No one at BMI knows what  
20 stations then are being surveyed or are a part of the sample.  
21 I don't know. No one knows.

22 When those logs come back, they come back to Ernst  
23 and Whinney. Obvious security reasons. We don't want any-  
24 body to know in-house who is being sampled.

25 Ernst and Whinney at periods delivered those to BMI



1 and for the first time we know which hundred stations were  
2 sampled for that period.

3 The logs are then analyzed. The performances are  
4 projected and quarterly distributions are made.

5 Q Are you finished, Mr. Cramer?

6 A In general terms, yes.

7 Q Are the stations selected by Ernst and Whinney  
8 selected on a random basis? Do you know what I mean by random  
9 as distinguished from haphazard for example?

10 A The technical way in which they select the stations  
11 I am not qualified. I know they use certain stratifications  
12 within those stratifications. How they are selected is some-  
13 thing I am not personally not familiar with.

14 I have absolutely nothing to do with the selection  
15 of the stations.

16 Q To the best of your knowledge, Mr. Cramer, the sur-  
17 vey does not systematically exclude any particular geographic  
18 region, station, day of week, time of day?

19 MR. DUNCAN: I am going to object. He said he has  
20 nothing to do with it and does not know anything about it.  
21 How can he answer the question?

22 CHAIRMAN BRENNAN: Mr. Cramer can answer he has no  
23 knowledge. I think Mr. Korman's general line of questioning  
24 is appropriate.

25 THE WITNESS: No one was instructed as a matter of

1 policy to design a sample which would exclude anything as far  
2 as radio is concerned.

3 BY MR. KORMAN:

4 Q As president of BMI, you would feel uncomfortable if  
5 you felt the sample was biased?

6 A Absolutely.

7 Q To the best of your knowledge, you being a notorious-  
8 ly good sleeper, the survey is on the up and up and it is a  
9 random survey in radio?

10 Isn't that true to the best of your knowledge?

11 A As I said earlier, it was designed to be an accurate  
12 reflection of what is played on radio. There were no in-  
13 structions from me or anyone to have it do anything other than  
14 to reflect what was being played out there.

15 Q Mr. Cramer, in radio do you get a different kind of  
16 broadcast during peak hours? By the way, what are the peak  
17 hours in radio? Let me ask that first.

18 A I am not prepared to say today whether that expres-  
19 sion peak hours or prime time is used in radio.

20 Q I will take either. Prime time or radio.

21 A I don't know whether that is used in radio today.

22 Q Let me ask you this question. Do you listen to the  
23 radio very much?

24 A Well, I don't know how much is.

25 Q Do you drive to work?

1           A     I listen to it in the morning when I drive in.

2           MR. DUNCAN: Your Honor, I would like the witness to  
3 be able to finish his answer. He was driving in.

4           MR. KORMAN: I thought he had arrived.

5           CHAIRMAN BRENNAN: Mr. Cramer, please finish. We  
6 are passing the peak or prime time for the Commission. We will  
7 recess for lunch, but finish your answer first.

8           THE WITNESS: I listen to the radio when I drive in  
9 in the morning. I listen to it when I drive home. I listen  
10 to it when I wake up in the morning.

11           I listen to it when I go to bed at night.

12           MR. KORMAN: One final question.

13           MR. DUNCAN: Your Honor, I am not sure the witness  
14 is through with his answer. I will continue to object until  
15 he has a chance to finish.

16           THE WITNESS: I am an avid radio listener.

17           CHAIRMAN BRENNAN: Mr. Korman, is that your final  
18 question before the luncheon break or your final question  
19 period?

20           MR. KORMAN: My final question before the luncheon  
21 break.

22           CHAIRMAN BRENNAN: I so feared. We will recess un-  
23 til 2 o'clock.

24           (Whereupon, at 12:15 p.m. a lunch recess was taken  
25 until 2:00 p.m. the same day.)

jsl

1 CHAIRMAN BRENNAN: The hearing will resume.

2 Mr. Korman?

3 MR. KORMAN: Thank you, Mr. Chairman.

4 BY MR. KORMAN:

5 Q Mr. Cramer, I believe we had established just  
6 before lunch that your listening habits with respect to  
7 radio have you listening as you drive to and from work and  
8 late at night, is that right?

9 A Yes, sir.

10 Q Do you notice any difference in the number of  
11 traffic reports that you hear on those three different  
12 occasions?

13 A My listening habits are a little different in that  
14 when I listen in the morning to the news program early in  
15 the morning there are a lot of traffic reports on WINS in  
16 New York. But then I switch stations and play the button  
17 game to listen to music. I don't notice that among the  
18 stations that play music that there is any change of  
19 traffic reports on the music stations, no.

20 Q You think there are about the same number of  
21 traffic reports in drive time as at 11 o'clock in the  
22 evening?

23 A I don't know. I really don't know, but I doubt it.  
24 But I don't personally know.

25 Q Mr. Cramer, do you think that the same records  
were in the jukeboxes in 1979 as were in the boxes in

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js2

1 March of 1981?

2 A For the most part, not the same records.

3 Q Mr. Cramer, does BMI survey local television  
4 regularly and has it done so for some years?

5 A Yes.

6 Q And you maintain regular statistics as to BMI's  
7 share of performances in local television?

8 A I don't know about regular statistics about  
9 our share. We do survey them for purposes of payment for  
10 our writers and publishers.

11 Q Mr. Cramer, if there were 10 performances of one  
12 given composition on a single program, radio or television,  
13 which was surveyed by BMI, how would BMI count those  
14 performances, as one or as 10?

15 Q Do you have with you, Mr. Cramer, a copy of the  
16 agreement between BMI and ORC which you testified was  
17 signed in January or February, I believe, of this year?

18 A I don't have a copy with me, no.

19 Q May I request of counsel a copy of the agreement  
20 between BMI and ORC?

21 MR. DUNCAN: Your Honor, we're going to go into  
22 that a little bit more with the next witness. If she has  
23 a copy, we'll certainly make it available.

24 MR. KORMAN: And if she does not --

25 CHAIRMAN BRENNAN: If she doesn't, Mr. Korman,  
Mr. Cramer is coming back so you'll get another opportunity.

js3

1 BY MR. KORMAN:

2 Q Will you bring it with you, Mr. Cramer, on your  
3 second appearance?

4 A Yes. But as I'm answerng you I have difficulty  
5 recalling signing such an agreement. I am sure I did but  
6 I just have no recollection at the present time. I don't  
7 want to promise you an agreement. Maybe somebody else at  
8 BMI signed it. I have no recollection. Whatever agreement  
9 we have I am sure we'll produce it whether I signed it or  
10 someone else signed it.

11 Q Thank you.

12 Over lunch, Mr. Cramer, do you happen to recall  
13 the number of jukebox actions brought by BMI since 1978?

14 A No.

15 Q Is Mr. David's guess, do you think, in the ball-  
16 park?

17 A Probably right.

18 Q I believe you used the term abusive judicial  
19 process with respect to bringing of infringement lawsuits  
20 against the jukebox operators. Would you call it an abuse?  
21 Why do you say that, Mr. Cramer?

22 A Well, that's one of the reasons I thought that it  
23 didn't make much sense to --

24 Q Do you literally mean it?

25 A I was going to answer. It didn't make any sense  
to --

js4

1 MR. DUNCAN: Your Honor, could he please finish  
2 his answer?

3 THE WITNESS: It didn't make any sense to base a  
4 fee on the number of actions that were brought because  
5 the actions were nonproductive. We didn't have any greater  
6 compliance with 130 lawsuits than we had without, assuming  
7 you brought 130 than before you brought the 130. So I  
8 thought it was a waste.

9 I'm finished.

10 BY MR. KORMAN:

11 Q I appreciate your saying that because I am  
12 inadvertently being rude. I don't mean to interrupt you at  
13 any time.

14 If, Mr. Cramer, you will accept my representation  
15 to you that as a result of ASCAP's having brought 130  
16 lawsuits approximately against the unlicensed jukebox  
17 operators, there are now 130, approximately, more licensed  
18 jukebox operators than there were before, plus \$300,000,  
19 approximately, in fees which cost something to bring in,  
20 but still it's of net profit to us by some margin.

21 If you accept those two facts, would you still  
22 think it was erroneous in any respect to have brought  
23 lawsuits at that rate or not productive of greater  
24 compliance?

25 A As I understand it, you told me that ASCAP got  
an additional \$300,000 in revenue from bringing these

js5

1 lawsuits. So if you did, obviously it must have been worth  
2 that to you. In terms of compliance with the statute, I  
3 have seen no evidence that more jukebox people have taken  
4 licenses than they did before you instituted these actions.  
5 Now, that's a question of judgment.

6 Q Commissioner Burg asked the question, Mr. Cramer,  
7 I believe, and I'm not sure it was answered. My note  
8 indicates that the question went along these lines.

9 Did BMI tell ORC that the 1981 survey would be  
10 used in connection with a 1979 distribution proceeding? If  
11 she didn't, I would like to ask that question.

12 COMMISSIONER BURG: I did not, but it was a  
13 similar question but not exact.

14 THE WITNESS: I believe that we explained the  
15 purpose of their survey and that it was to be used in these  
16 hearings or for any other purposes. But initially the  
17 primary purpose of doing it was to comply with what we  
18 thought the Tribunal wanted.

19 BY MR. KORMAN:

20 Q And was that statement made at the meeting you  
21 attended?

22 A As part of the general background information  
23 that was given to the representatives, I believe so.

24 Q Do you recall what their response was?

25 A No, I don't.

Q Finally, a question or two along the lines of



js6 1 something that the Chairman raised. Would you tell  
2 those members of the Tribunal who may not know, who Sidney Kaye  
3 was?

4 A Well, he was a lawyer.

5 Q His connection with BMI, to be more precise?

6 A For many years he was general counsel. For many  
7 years he was a member of the board of directors. I think  
8 he had the title of honorable chairman of the board for a  
9 number of years before he died, and I think before that  
10 time he was chairman of the board until -- I don't know  
11 when he no longer had the position of chairman of the  
12 board.

13 Q Would it be sometime in the 1970s?

14 A Well, I know that his capacity changed in 1968  
15 and sometime thereafter he became honorary chairman of the  
16 board and I believe that his term as general counsel ended  
17 in 1970 or something like that. But I don't know what  
18 else you want me to tell you about him. I know a great  
19 deal about him.

20 Q When was your first professional association with  
21 him?

22 A 1951.

23 Q You were then an associate of the law firm headed by  
24 the late Judge Sam Rosenman?

25 A That's right.

Q And Mr. Kaye was a partner in the firm?

1 A That's correct.

2 Q And the firm represented CBS and BMI at that  
3 time?

4 A Among many other clients, yes.

5 Q And for many years thereafter. Is it fair to say,  
6 Mr. Cramer --

7 A I'm sorry, I didn't hear that.

8 Q And for many years thereafter.

9 MR. DUNCAN: Is that a question.

10 THE WITNESS: I can't tell you when they continued  
11 to represent CBS. I know when they no longer represented  
12 BMI, but I don't know how long they represented CBS.

13 BY MR. KORMAN:

14 Q That was 1970?

15 A When they no longer represented BMI? No, 1969  
16 but I don't know exactly the date, but it was in 1969.

17 Q Was BMI often referred to or generally believed  
18 to be the brainchild of Mr. Kaye?

19 A In the early years he was frequently referred to  
20 as the father of BMI.

21 Q Were his views the philosophical views of BMI in  
22 terms of its role as a music licensing organization?

23 A I don't know what it was prior to the time I came  
24 in, but he did not have that role beginning in April, 1968.

25 Q Mr. Cramer, I believe you told me the other day in  
another context that you did some work in the early '50s

js8

1 in connection with a litigation under the ASCAP consent  
2 decree which was the first rate proceeding under that decree  
3 and it was a proceeding brought by the local television  
4 broadcasters for determination of reasonable license fees,  
5 is that correct?

6 MR. DUNCAN: Your Honor, I'm going to object to  
7 that and ask that a showing of relevance be made.

8 CHAIRMAN BRENNAN: Mr. Korman?

9 MR. KORMAN: Mr. Chairman, I'm about to introduce  
10 a letter. This morning Your Honor asked Mr. Cramer to  
11 comment on the statement in the summary of Mr. David's  
12 testimony with respect to the role of BMI, the sort of  
13 organization it is as a user organization. And I'm leading  
14 up to the introduction of the letter from Mr. Kaye, and I  
15 just want to identify the circumstances under which that  
16 letter was written.

17 CHAIRMAN BRENNAN: Well, fine, the metaphor. You're  
18 in slow gear, but go ahead.

19 MR. KORMAN: I'll be finished in a moment.

20 BY MR. KORMAN:

21 Q Do you recall, Mr. Cramer, those circumstances?

22 A Yes.

23 Q Do you remember who represented the local  
24 television broadcasters?

25 A Yes, I do.

Q It was the firm of Judge Rifkin and a lawyer

js9

1 named Sam Silverman was involved, is that correct?

2 A Yes, I'm smiling because they are now ASCAP's  
3 counsel, yes.

4 Q Mr. Koenigsberg will show you a letter from  
5 Mr. Kaye to Sam Silverman, dated October 29, 1951, which  
6 came to light as you will note from the exhibit mark, and as  
7 you perhaps know independently, Mr. Cramer, during the  
8 deposition of Judge Rifkin in the lawsuit in which BMI  
9 and ASCAP are both defendants, known as Buffalo Broadcasting  
10 against ASCAP and BMI, in January of this year.

11 And the letter is a three-page letter in which  
12 Sidney Kaye, counsel for BMI, outlines for Sam Silverman,  
13 counsel for the television broadcasters, tactics and strategy  
14 to assist the television broadcasters in beating down the  
15 ASCAP rate.

16 Isn't that a fair description of the contents of  
17 this letter? The letter, of course, will speak for itself  
18 but I'd like your comment on that.

19 MR. DUNCAN: Mr. Chairman, I'm going to object  
20 on the grounds that the letter was written nearly 30 years  
21 ago and that the statute of limitations hasn't run something  
22 else surely must have. So I'm going to object just on  
23 relevancy.

24 CHAIRMAN BRENNAN: The Chair is going to overrule  
25 the objection. We will decide how much weight to give the  
letter.

js10

1 letter.

2 MR. DUNCAN: Thank you, Mr. Chairman.

3 THE WITNESS: I don't know what the oustanding  
4 question is. I'm sorry.

5 BY MR. KORMAN:

6 Q I had described the letter and asked you whether  
7 you would agree with the description of it, namely that it  
8 is Mr. Kaye's --

9 CHAIRMAN BRENNAN: Mr. Cramer, do you need a chance  
10 to read the letter? Perhaps that might be of some value.

11 THE WITNESS: Thank you.

12 MR. KORMAN: While Mr. Cramer is reading the  
13 letter, Mr. Chairman, may I move its admission into evidence  
14 as ASCAP Exhibit X-B?

15 MR. DUNCAN: I'll note the same objection.

16 CHAIRMAN BRENNAN: Noted. It will be Exhibit B.

17 (The document referred to was  
18 marked ASCAP Exhibit B for  
19 identification and received  
20 in evidence.)

21 THE WITNESS: This is a very tightly written  
22 letter. I've done a hasty review of the letter and it  
23 would be very difficult for me to characterize it in one  
24 sentence. I think the document speaks for itself.

25

jsll

1 BY MR. KORMAN:

2 Q Mr. Cramer, I believe when you have had more time  
3 to read it you will agree with my characterization of it  
4 as evidence of cooperation between BMI counsel and counsel  
5 for a nationwide committee of broadcasters. But BMI  
6 counsel was cooperating with the users counsel in opposition  
7 to ASCAP.

8 The question is that was clearly BMI's policy,  
9 in fact, as in 1951. Like you, I knew Mr. Sidney Kaye  
10 for many, many years and I knew his view of the world and  
11 of ASCAP and BMI. And I knew, and I ask you, sir, wasn't  
12 that Mr. Kaye's view --

13 CHAIRMAN BRENNAN: Mr. Korman, you'-e beginning  
14 to venture in the line of a witness.

15 MR. KORMAN: My question is, Mr. Kaye's view and  
16 BMI's approach to the problem remained the same so long as  
17 Mr. Kaye was at BMI, is that not true?

18 THE WITNESS: I'm not capable of answering that  
19 question. It's not possible to answer.

20 BY MR. KORMAN:

21 Q Is it still BMI's practice to cooperate with  
22 counsel for any of the appointed committees when they deal  
23 with litigation with ASCAP on rate questions?

24 A As you know, I have more trouble with those people  
25 than you do, so the answer to that question is there was  
no overt cooperation and as you know we're both defendants

jsl2

1 in the same action. And I don't get along any better with  
2 them than you do.

3 Q Was there any covert cooperation?

4 A I say, unequivocally, none.

5 Q Mr. Cramer, I've seen data, to refresh your  
6 recollection, submitted by all industry committees in the  
7 1970s, after you had become president, purporting to show  
8 BMI shares of radio performances which I was told came  
9 from BMI.

10 Do you recall whether BMI, in the 1970s, furnished  
11 any data to NAB committees negotiating with ASCAP?

12 MR. DUNCAN: Your Honor, I'm going to renew the  
13 objection on relevancy. Now, this is a 1981 jukebox  
14 distribution proceeding. What happened in 1951 and 1971,  
15 as far as I can see does not relate to who should get whose  
16 share of the jukebox royalty fee so I'll just make the  
17 objection again.

18 CHAIRMAN BRENNAN: Objection is noted.

19 THE WITNESS: In negotiating with the radio  
20 industry from time to time I presented data to the repre-  
21 sentatives of the radio industry to increase our share of the  
22 payment.

23 BY MR. KORMAN:

24 Q Mr. Cramer, does BMI's survey data include  
25 information with respect to ASCAP works as distinguished from  
BMI or other works?

1 COMMISSIONER BRENNAN: Mr. Korman, is Mr. Cramer  
2 the best witness for this type of question?

3 MR. KORMAN: My problem, Mr. Chairman, as you may  
4 recall is that there was survey information testified to by  
5 another BMI witness who was the director of licensing in  
6 the cable distribution proceeding. And he didn't know the  
7 answer. Mr. Cramer was then off the stand and so I  
8 couldn't ask him the question, and we will later be getting  
9 the director licensing who again will not know.

10 COMMISSIONER BRENNAN: Mr. Cramer, are you in a  
11 position to respond to questions along these lines?

12 THE WITNESS: First let me make it clear that  
13 that summary that Mr. Korman just gave is incorrect. The  
14 director of licensing in the cable proceeding which is a  
15 matter of record preceded me in my testimony.

16 COMMISSIONER BRENNAN: Are you in a position to  
17 respond to questions along this line?

18 THE WITNESS: Some, yes. I can answer some of  
19 these, sure.

20 COMMISSIONER BRENNAN: Mr. Korman, let's see where  
21 we go.

22 MR. KORMAN: I was just asking as a final question  
23 whether, as BMI maintains data with respect to performances  
24 and compositions, it separates out ASCAP works from BMI  
25 works or whether all non-BMI works are simply lumped in one  
other category?



jsl4

1 THE WITNESS: The general practice is to identify  
2 BMI works and everything else is put in the category called  
3 "Other." Now, there may be an exception to that that I  
4 can't think of right now on performance surveys. But the  
5 general practice is to just say, this is ours and everything  
6 else is ASCAP, SESAC, public domain and others.

7 Q Mr. Cramer, does BMI process the data with respect  
8 to non-BMI performances right through to the end so as to  
9 be able to wind up with numbers showing based on BMI's survey  
10 a share for BMI as against ASCAP, SESAC, Italian Book, public  
11 domain, anything else?

12 A Maybe I don't understand the question. If I  
13 understand it, I think it's what I have just answered. When  
14 we process for certain purposes, we'll say, "Okay, this is  
15 BMI's share of radio. We have 54 percent of AM, which is  
16 I think the current data. We have 54 percent of what goes  
17 out on AM radio, the balance is everybody else's. We do it  
18 the same way for FM. I think our percentage the last time  
19 was, say, 48 percent or 49 percent for BMI on FM. All the  
20 rest belongs to the ASCAP, SESAC, public domain, privately  
21 licensed and all others.

22 If that's what you asked me, then that's the  
23 answer but if it is, it's the same question I answered  
24 before.

25 MR. KORMAN: Thank you, Mr. Chairman, I have no  
further questions.

js15

1 further questions.

2 CHAIRMAN BRENNAN: Mr. Ciancimino?

3 BY MR. CIANCIMINO:

4 Q Mr. Cramer, one of the disadvantages of a smaller  
5 claimant before this Tribunal is that we don't have the  
6 money to conduct surveys such as the ORC survey done by  
7 BMI. Can you, in any way, help SESAC with regard to the  
8 ORC study and telling us if there were any percentage of  
9 SESAC music that was identified by this survey?

10 A I saw the results. I was not involved in the  
11 detailed processing of these logs and to the best of my  
12 knowledge there was no breakdown on others. BMI's percentage  
13 was, for lesser purposes, 54 percent on the district count,  
14 by number. Everybody else was part of 46 percent without  
15 any effort to break down that 46 percent into its components.

16 Q I'm going to ask you a hypothetical question.  
17 If you were the chief executive of a smaller claimant before  
18 this Tribunal, in fact, the claimant similar to the SESAC  
19 with SESAC's limited resources or the limited resources of  
20 such a smaller claimant, what would you as the chief  
21 executive use as guidelines to establish its claim before  
22 this Tribunal?

23 A Well, I have to give you a hypothetical answer.

24 Q I would appreciate it.

25 A I would probably analyze the position on the charts.  
SESAC has had some material on the charts recently. But

jsl6

1 I'd be hard put to tell you quite how to do it. It would be  
2 very difficult to do considering what's involved in the  
3 survey. It's not just hiring outside people to do the  
4 survey. You also have to have sufficient backup to process  
5 it. If you don't have that, I don't know what you do. You're  
6 in trouble.

7 Q In referring to the trades, would you not then  
8 be caught in the crossfire of ASCAP's contention that the  
9 trades have no relationship to performances and BMI's  
10 contention that income has no relationship to performances?  
11 Where would that leave the smaller claimant?

12 A Well, in the case of jukeboxes it is my view that  
13 the position in the charts more clearly reflects  
14 performances on jukeboxes than in almost any other area so  
15 that there is a much closer correlation between charts and  
16 jukebox performances. And I would probably stick with the  
17 charts. And that basically is our position here.

18 It's not that we rely wholly and solely on the  
19 actual count done. That's just one criteria. I think the  
20 Tribunal has indicated earlier in its rulings that that is  
21 not the exclusive criteria that is the actual count but I  
22 would go with the charts.

23 Q I believe, Mr. Cramer, that BMI was a party to a  
24 voluntary agreement?

25 A Excuse me. Income in other areas, as I explained  
earlier -- I'm sorry to interject -- I don't know if you

jsl7

1 were here. You arrived a little bit late -- but income in  
2 other areas should not determine, in my view, what should be  
3 paid for performances on jukeboxes.

4 Q Yes, I was here for that testimony.

5 A You have a joint work written by a SESAC writer  
6 and a BMI writer. It would be unfair to say to the SESAC  
7 writer, "You should get far less than your co-writer got  
8 because television pays BMI more than television pays  
9 SESAC." You're talking about a performance that takes place  
10 on a jukebox. The same is true whether ASCAP or BMI were.  
11 If two people collaborate, if we use the income analogy, the  
12 payments will be disparate for the same performance. So  
13 what I'm saying to you is that I would not use that and it  
14 would be very difficult but I would try to go with the charts  
15 some way and show a correlation.

16 Q Mr. Cramer, BMI was a party to a voluntary agree-  
17 ment as to the distribution of jukebox monies for the year  
18 1978, is that true?

19 MR. KORMAN: I object to the question. If it's  
20 the voluntary agreement I'm thinking of, it's an agreement  
21 that was not supposed to be referred to for any other purpose.

22 CHAIRMAN BRENNAN: Objection overruled.

23 THE WITNESS: Yes, we were party.

24 BY MR. CIANCIMINO:

25 Q And do you recall SESAC's percentage as part of  
that agreement?

jsl8

1 MR. KORMAN: Same objection, Mr. Chairman.

2 CHAIRMAN BRENNAN: Overruled.

3 BY MR. CIANCIMINO:

4 Q If I would refresh your recollection and tell you  
5 that SESAC received 5 percent, would that refresh your  
6 recollection in this regard?

7 MR. KORMAN: Continuing objection, Mr. Chairman.

8 CHAIRMAN BRENNAN: Noted.

9 THE WITNESS: Yes, I think so. Yes, it did.

10 BY MR. CIANCIMINO:

11 Q Now, because we do feel at a disadvantage in this  
12 type of a tribunal I'm going to be forced to ask you what  
13 some people may consider a rather dangerous question, but  
14 I really have no alternative. In the event that there were  
15 within BMI's power the right to allot to SESAC a percentage  
16 of jukebox distributions for the year 1979, what would that  
17 percentage be? And I realize this is simply a matter of  
18 an expert opinion and not based on any specific data.

19 MR. KORMAN: Mr. Chairman, I object to the question.  
20 It has not been demonstrated Mr. Cramer is an expert in this  
21 area, nor is there any factual basis whatsoever for forming  
22 an opinion as to what SESAC's share should be.

23 CHAIRMAN BRENNAN: Mr. Cramer has been asked his  
24 view on a variety of subjects, overruled.

25 THE WITNESS: Well, our position, for the record,  
as to how much we should get is pretty clear and we're

jsl9

1 going to introduce the data to show you what our share is.  
2 In the case of SESAC, the expenses involved in the proceeding  
3 are disproportionate to its share of performances. So I  
4 would not distribute the money to SESAC strictly on a  
5 performance basis if I had to do it.

6 For example, if we were to break down the others  
7 and say BMI had 54 to 56 per-cent, which we're going to show  
8 you, but if SESAC had, for illustrative purposes, 3 percent,  
9 I would not urge that SESAC be limited to that amount  
10 because of the high expense in processing and going through  
11 this. I would say it would be higher. I would think that  
12 probably 5 percent of the distribution, but that's a guess  
13 on my part..

14 COMMISSIONER BURG: Excuse me, Mr. Ciancimino.  
15 Would you repeat that, Mr. Cramer? Are you saying that in  
16 the case of SESAC, at least, for illustrative purposes that  
17 regardless of what the survey shows in terms of performances  
18 that they would get more than the survey showed?

19 THE WITNESS: Yes. If you asked for my opinion,  
20 we don't have it in the survey. The survey is not broken  
21 down like that. If we did break it down, I think it would  
22 be rather small. But because of the high cost of processing  
23 this on behalf of SESAC because they had to expend a lot  
24 of time.

25 COMMISSIONER BURG: Whose cost? Your costs?

THE WITNESS: No, their costs. If they only got

1 reimbursed, for example, 3 percent, if that's what it  
2 showed, they come come out with zero because of the costs  
3 involved in coming here and going before the Tribunal. So  
4 I'd say that's not -- so in their case it should not quite  
5 reflect what should be paid to them.

6 COMMISSIONER BURG: But excuse me, Mr. Cramer, then  
7 what you're left with is whoever can run up the largest  
8 bill before this Tribunal ought to get the biggest share of  
9 the performance royalties. Is that what you're saying?

10 THE WITNESS: No, I'm not really saying that. I'm  
11 saying in their case if they took that small percentage, it  
12 would be nothing. And I would make an exception in their  
13 case and say they should get 5 percent. Why 5 percent I don't  
14 know.

15 COMMISSIONER BURG: Nor do I. I mean if the survey  
16 showed 5 percent, they should get 5 percent. If it showed  
17 7 percent or 3 percent, I don't know why you're introducing  
18 that other factor.

19 THE WITNESS: I wasn't asked about this. Let me  
20 put it this way to you, Commissioner. If we were to design  
21 the survey to be effective in the future, 1983 or '82 or  
22 some other year, and we had agreed on these ground rules  
23 and this is the way we were to go, I would say whatever the  
24 percentages show that's what they should get. I would say  
25 that would be correct. I would endorse that completely.

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I'm just talking about the one year which I think  
is an exception here.

COMMISSIONER BURG: Nothing personal, Mr.  
Ciancimino. Please go ahead.



1 CHAIRMAN BRENNAN: Commissioner Coulter?

2 COMMISSIONER COULTER: Excuse me, Mr. Ciancimino.

3 I just want to pursue this line of questioning here. If,  
4 given your original example that they came up with three  
5 percent in the survey, but you felt that because of their  
6 burden, they should be allocated five percent, presuming that  
7 extra two percent had to come out of you and ASCAP, would  
8 you be willing to give up one percent?

9 THE WITNESS: Well, that is where it comes  
10 from, yes. It does come from there with maybe some foot-  
11 note exceptions, that's where it would come from.

12 COMMISSIONER COULTER: You would be willing  
13 to give that up?

14 THE WITNESS: Yes. It would mean that much  
15 less to distribute, but I would hope that in the future. it  
16 would be necessary, that ultimately there would be procedures  
17 established which would put this on a different basis.

18 MR. CIANCIMINO: That would show our percentage  
19 at seven percent; right?

20 THE WITNESS: Maybe, maybe.

21 COMMISSIONER BURG: Then you might get 10.

22 THE WITNESS: No, I would not say that,  
23 Commissioner. If you establish those procedures for the  
24 future where everybody knew these were the ground rules  
25 and this is the way we were to go, that's the way I would

lw2

1 say we were to go. But, we're trying to do something here  
2 which is really different and it's innovative and it's  
3 ground-breaking. And, I treat this as a year that's an  
4 exception.

5 MR. CIANCIMINO: I have no further questions  
6 of Mr. Cramer.

7 CHAIRMAN BRENNAN: Mr. Angel?

8 CROSS EXAMINATION

9 BY MR. ANGEL:

10 Q Mr. Cramer, I represent the Italian Book  
11 Company, and they are the copyright owners for performing  
12 rights purposes--

13 COMMISSIONER BURG: Mr. Cramer, would you please  
14 sit down and address the microphone.

15 MR. ANGEL: Yes. I represent the Italian Book  
16 Company. I just have a very few questions with regards to  
17 information on your Exhibit Four.

18 BY MR. ANGEL:

19 Q I notice it is broken down between Cashbox and  
20 Replay and broadcasting. And, the songs are divided between  
21 pop singles, country singles, disco singles, contemporary  
22 and country. I was wondering, under what category would  
23 popular classical music come under, or was that not taken  
24 into consideration?

25 A I did not supervise the preparation of those

1w3

1 exhibits. But, I could answer it anyway. Those exhibits  
2 were derived from the trade publications and if the trade  
3 publications had a chart entitled Popular Operatic Favorites  
4 and we thought that that music would be played on jukeboxes,  
5 we would have included it. We just took the charts as  
6 defined by the trade publications.

7 Q Well, the trade publications do have classical  
8 charts, but I don't see that reflected here.

9 A Well, I don't recall visiting a jukebox that  
10 played classical music, but I could be wrong. Some of us  
11 might like it, but I don't think you have three minute  
12 selections of classical music that's going to be played on  
13 jukeboxes.

14 Q Well, would you think, as an example, Pavarotti's  
15 Oh Solamelio (ph), you think none of those songs would ever  
16 get on a jukebox despite the fact that they were number one  
17 single albums in the last three years in classical and also  
18 hit the other charts, too.

19 A Well, if they hit the other charts as singles,  
20 they will be on the charts. If they are not on the charts  
21 as singles, they are not going to be played in jukeboxes.  
22 I don't know jukeboxes, to the best of my knowledge, that  
23 buy an album of, say, 40 minutes duration and take  
24 snippets out of that album. I don't know that to be the  
25 practice. If it is, I have missed the jukeboxes that do that.

lw4

1 In other words, I think the jukebox is programmed  
2 exclusively from singles.

3 Q On the letter here from Mr. Edward Adler from  
4 Replay Publishing, Inc., it states, "concerning oldies and  
5 ethnic records, let it be known that thousands of these  
6 singles are in fact in active play on U.S. jukeboxes."  
7 On the last page, it says, "My opinion that around 75 percent  
8 of the play each year goes to that now worn phrase chart  
9 music, if the remaining specialty program has to be dealt with  
10 then perhaps the songwriter point system of past performances  
11 might be used there."

12 My question to you is that Mr. Adler considers  
13 that possibly 25 percent of the music on the jukeboxes  
14 is specialty programming. Is it your view then that there is  
15 quite a bit of ethnic music which would include Italian  
16 ethnic music played across the country in jukeboxes, and that  
17 this music would represent some percentage in the total  
18 pie that we are talking about here?

19 A It seems to me the best evidence of that is a  
20 survey that we will introduce here and we will show exactly  
21 what took place after visiting hundreds of establishments.  
22 I can't speculate as to that. I just don't know.

23 MR. ANGEL: I have no further questions.

24 CHAIRMAN BRENNAN: Commissioner Burg?

25 COMMISSIONER BURG: One clarification, Mr. Cramer.

1 In response to a question presented to you by  
2 Mr. Ciancimino, I think you said or made a note of it,  
3 that more than in any other area, there is a correlation  
4 between charts and jukebox performances. Are you excluding  
5 radio? Is there any correlation between the charts  
6 and radio performances of music?

7 THE WITNESS: There is, but it's higher in  
8 my opinion that in jukeboxes. It is significant in  
9 radio, but even higher in jukeboxes.

10 COMMISSIONER BURG: Would you explain that to  
11 me briefly please?

12 THE WITNESS: I think you have a greater  
13 diversity of programming on radio. You not only have top 40,  
14 but you have, in a major market area, you may have a country  
15 station, a jazz station.

16 COMMISSIONER BURG: Granted, I understand that.

17 THE WITNESS: All those kinds of stations are  
18 highly specialized today, unlike the situation of 10  
19 years ago. And so, while many stations rely on the charts,  
20 whether it be a top 40 station or some other programming  
21 format which is heavily pop-oriented or contemporary-oriented,  
22 there is a lot of other programming going out there. So  
23 that, while the charts have a relationship to what is played  
24 on many stations, it is not as clear as it is in jukeboxes  
25 where, for the most part, you don't have that diversity as

lw6

1 you do on radio in my view -- and where the jukebox people,  
2 themselves, rely more heavily on the charts for their  
3 programming. So, if I misled you, I'm sorry. Radio and  
4 charts, there is some relationship. But, what I think I  
5 said was not to the same extent as it is in jukeboxes,  
6 which is even much closer. That is my view.

7 COMMISSIONER BURG: That would be contrary to  
8 my impression, but that you very much.

9 CHAIRMAN BRENNAN: Mr. Duncan?

10 MR. DUNCAN: Just one line of redirect,  
11 Mr. Chairman.

12 REDIRECT EXAMINATION

13 BY MR. DUNCAN:

14 Q Mr. Cramer, that document has been marked as  
15 ASCAP Exhibit A. And, it is a letter or an exchange of  
16 correspondence between Mr. Delmas Bach back in March of 1978  
17 and Mr. Zayman (ph), who is the senior vice president  
18 of BMI. Let me ask you this. Mr. Bach's letter  
19 in the paragraph denominated experience one, would it be  
20 fair to summarize that as a complaint from an affiliate to  
21 the effect that he had not received payment from BMI, notwith-  
22 standing the fact that his song appeared on one of the  
23 charts? Is that basically what that is about?

24 A Yes.

25 Q Now, did BMI then or does it now use charts as

1 the basis for making payments to its affiliates?

2 A No.

3 Q And, what method does BMI use to determine  
4 how much money to pay to affiliates?

5 A We pay affiliates based upon performances that  
6 take place on radio and on television. Now, we measure  
7 the performances by that yardstick, by those yardsticks,  
8 radio performances, television performances. We do the  
9 survey on radio as I have described earlier. We use a  
10 different survey on television, a much broader survey on  
11 television, I think. All the money that we collect from  
12 all sources is put into one pot after we take off our  
13 overhead. We distribute it to writers and publishers  
14 based upon performances in television and radio.

15 We believe that radio in the United States  
16 more accurately reflects that is played everywhere else around  
17 the country. So, we use that at the moment as a standard  
18 and it's very significant for us.

19 Q Does BMI make any use internally of trade  
20 charts?

21 A Yes. Trade charts are a good selling tool.  
22 When we go to license an establishment and they want to  
23 know what we have currently, very frequently we'll say here  
24 is the current issue of one of the trades and look at it  
25 yourself. This is not something that we compiled. Take a

1 look and see what's in our reperatory. So, it's a frequently  
2 used sales tool.

3 It also is used internally because sometimes  
4 it gives us some handle on what's going on. If a writer  
5 comes in and he has a song that's numbered 20 on the charts,  
6 we might not get around to log and pay for that performance  
7 for another eight months. So, in the meantime, if we  
8 know that the song is doing reasonably well, it sometimes  
9 provides the basis for us internally to make an advance to  
10 the writer. But, it is not used to pay. Payment is  
11 based on performances.

12 Q And, you have already testified in response to  
13 other questions that in your opinion, charts do, however,  
14 reflect what is performed on jukeboxes. Is that correct?

15 MR. KORMAN: Object to the form of the question.

16 THE WITNESS: May I answer?

17 CHAIRMAN BRENNAN: There is a pending objection.  
18 Does the pending objection have to do with the summary of the  
19 witness' testimony?

20 MR. KORMAN: Yes. I don't think that was the  
21 testimony.

22 CHAIRMAN BRENNAN: Could you ask a question,  
23 Mr. Duncan.

24 BY MR. DUNCAN:

25 Q How do charts relate to or reflect records  
which are played on jukeboxes, if they do?



js21 fls lw8 1

MR. KORMAN: Which charts, Mr. Duncan?

MR. DUNCAN: The trade charts, the ones that we have been talking to.

MR. KORMAN: Which trade charts?

MR. DUNCAN: The ones that Mr. Cramer was referring to in his testimony earlier, whichever ones they were.

MR. KORMAN: Mr. Chairman, I have a problem with the question because my recollection of the testimony was that he was agreeing with the statement that Mrs. Zayman made in her letter, the exhibit which led my friend, Mr. Duncan, to rise on this occasion. And we have already covered that, it seems, and Mr. Cramer's testimony is what it is and I don't understand this question.

Mr. Cramer said that the jukebox charts mean one thing and other charts mean something else. It was in the testimony that all charts have the same relationship to all performances. Indeed, I believe that the testimony was that the jukebox charts don't show anything about television performances. That's my recollection of his testimony on jukebox charts.

CHAIRMAN BRENNAN: As we say repeatedly, the record will speak for itself. Mr. Duncan, if you could just ask questions, we could perhaps proceed.

MR. DUNCAN: I think I had a question pending,

1 Mr. Chairman.

2 MR. KORMAN: I think I objected to it. May we have  
3 it read back, please?

4 (The reporter read the record as requested.)

5 THE WITNESS: My understanding is that jukebox  
6 operators rely heavily on the charts in their programming  
7 of the jukeboxes.

8 MR. DUNCAN: That's all I have, Mr. Chairman.

9 CHAIRMAN BRENNAN: Thank you, Mr. Cramer.

10 Mr. Duncan, you may call your next witness.

11 MR. DUNCAN: I'd like to call Mrs. Mary  
12 Kilkenney, please.

13 Whereupon,

14 MARY KILKENNY

15 was called as a witness, having been previously sworn by the  
16 Chairman, was examined and testified as follows:

17 DIRECT EXAMINATION

18 BY MR. DUNCAN:

19 Q Mrs. Kilkenney, for the record would you state  
20 your name, please?

21 A Mary Kilkenney.

22 Q And what is your business address, please?

23 A My current business address?

24 Q Yes.

25 A 1309 U.S. Route 1, Princeton University.

Q And what is your occupation, Mrs. Kilkenney?

js23

1 A I'm vice president and associate director of  
2 the Government Division of Audits and Surveys.

3 Q And would you state briefly for the Tribunal what  
4 your professional training has been?

5 A Briefly, my training has been basically in the  
6 areas of education. I have worked in the field of gathering  
7 survey data for the past 13 years. I have directed major  
8 projects primarily in the areas of government.

9 Q Primarily in the area of what? I'm sorry.

10 A Government studies.

11 Q Were you at one time employed with or by Opinion  
12 Research Corporation?

13 A Yes, I was.

14 Q And when was that?

15 A I was employed there for four years and I was  
16 vice president there. I left on April 27th of 1981.

17 Q And you went from there to your present position  
18 with Audits and Surveys?

19 A Audits and Surveys.

20 Q And would you describe what kind of organization  
21 Opinion Research Corporation is and was when you were there?

22 A Opinion Research Corporation has been in the survey  
23 research business for the past 43 years. It's a very well  
24 respected corporation and they deal with both the private  
25 and public sector in terms of gathering data, analyzing  
data and preparing reports.

js24

1 MR. DUNCAN: Mr. Chairman, from our prehearing  
2 statement we inadvertently omitted data about Opinion Research  
3 Corporation. We now have that. I'd simply like to add it  
4 to what we have already submitted and when I move this  
5 witness' testimony into evidence I would move it into  
6 evidence also.

7 CHAIRMAN BRENNAN: Mr. Korman, any objection to  
8 that?

9 MR. KORMAN: No.

10 BY MR. DUNCAN:

11 Q Mrs. Kilkenney, did there come a time when Opinion  
12 Research Corporation was approached by a representative or  
13 representatives of Broadcast Music, Inc.?

14 A Yes.

15 Q And approximately when was that?

16 A December of 1980.

17 Q And who in ORC was contacted, if you know?

18 A I was contacted.

19 Q And by whom were you contacted?

20 A Dr. Richard Link.

21 Q And what did Dr. Link state to you initially?

22 A He told me the interest BMI had in conducting the  
23 survey and asked if we felt it was feasible to conduct this  
24 kind of a survey.

25 Q And as a result of that conversation what, if  
anything, did you do?

hs25

1           A           We met Dr. Zadet, who is a senior vice president  
2 of Opinion Research Corporation, and my immediate  
3 supervisor, and I met with people at BMI on January 13th to  
4 discuss the feasibility of collecting data on jukebox  
5 selections.

6           Q           And who from BMI attended that meeting?

7           A           If I can recall the names, Mr. Cramer, Allen  
8 Smith and Mr. Chapin. I think that's all. I can't recall  
9 anymore.

10          Q           And could you tell the Tribunal briefly what  
11 ORC was asked to do by BMI?

12          A           They described the kind of needs they had in  
13 gathering data on jukebox selections and wondered what  
14 framework we would use in developing a sampling frame for con-  
15 ducting a survey. They wondered what kind of training methods  
16 we would use --

17                   MR. KORMAN: I'm sorry. I'm having trouble  
18 hearing you. Could you go a little more slowly, please,  
19 and into the microphone, please.

20                   THE WITNESS: Yes.

21                   We were asked about collecting the data, the  
22 methods we would use in collecting the data and the sampling  
23 frame we would use and the procedures we would use in  
24 drawing the sample.  
25

js26

BY MR. DUNCAN:

Q Now, as a result of that, what, if anything, did you do?

A Well, I think the basic outcome of that meeting was to say that we felt in replicating our national probability sample using the primary sampling units from our national probability sample, it was reasonable to assume the jukebox establishments would be distributed roughly in a population proportional to the population size which is similar to any national probability sample. And using their design we had confidence that a repetitive sample of jukebox establishments, a data could be obtained from a repetitive sample of jukebox establishments.

MR. KORMAN: Excuse me. Mr. Chairman, the witness is very familiar with this material. I'm having trouble following her. She's going very fast. I wonder if I might respectfully ask her to slow down.

THE WITNESS: Yes, I shall.

BY MR. DUNCAN:

Q Now, prior to this meeting had you submitted a proposal to BMI or did the proposal come after the meeting?

A The proposal came after it was submitted on February 9, 1981.

Q And in the proposal, what did you do in the proposal?

A The proposal, once again, restated the sample

js27

1 design, the objectives of the study as we saw them, how we  
2 would select and train the interviewing staff and the pretest  
3 we proposed to conduct since this was a rather unusual  
4 assignment. We wished to conduct a pretest of our  
5 procedures before we continued with the full-scale survey.

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1 Q You said it was unusual assignment for ORC.  
2 Unusual in what sense?

3 A We had never done a survey of jukeboxes establish-  
4 ments although we had done other observational studies.

5 Q Now, after you had submitted your proposal, did  
6 there come a time when a contract was executed between  
7 ORC and BMI?

8 A Yes. It was.

9 Q And when was that?

10 A I believe it was about two weeks later.

11 Q Do you happen to have a copy of that contract with  
12 you?

13 A I am sorry I don't. Since I am no longer in the  
14 employ of Opinion Research, I don't have access to the pro-  
15 posal.

16 Q Was there a written contract, as best you recall?

17 A The proposal became part of the contract.

18 Q Now, once the contract was signed, Mrs. Kilkenny,  
19 would you describe for the Tribunal what Opinion Research  
20 did and let me first ask you to start by describing methodolo-  
21 gically which you proposed to follow and which, you, in fact,  
22 follow?

23 A Once the sample design had been established and  
24 the sampling frame which was the national probability sample  
25 had been agreed upon, our job was to actually select the



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2)

1 sample using one of ORC's national probability samples. We  
2 had proposed and which we did, selected 120 primary sampling  
3 units.

4 Q Before you get to that, would you tell the members  
5 of the Tribunal what you mean when you refer to sample  
6 design and sample frame?

7 A Sampling frame is the area in which you will work.  
8 It sets the stage for which you will make your stages of  
9 sampling occur. In most sampling instances you are a  
10 multi-stage sample.

11 You select the unit, the primary unit of a  
12 location. Within that location, you may select establish-  
13 ments or households. Within households, you may select  
14 individuals. So, it is called multi-stage sampling which  
15 was done here. And that is how we originally set it up.

16 That was our first task was to select our primary  
17 sampling units.

18 Q And what were those primary sampling units?

19 A I believe the lists of them are appended to the  
20 back of the report that ORC submitted.

21 Q Now, as I understand it from your written statement,  
22 that list was selected from a larger list which ORC had,  
23 is that correct?

24 A That is correct.

25 Q Would you explain how that process occurred?

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1 A This will get a little complicated. I don't think  
2 you want me to explain the entire procedure of selecting  
3 a master sample, do you?

4 Q No.

5 CHAIRMAN BRENNAN: He may but a little later in  
6 the afternoon.

7 BY MR. DUNCAN:

8 Q As best you can, I want you to try to describe how  
9 you ended up with that list and where it came from?

10 A Let me just give you a very brief description of  
11 how one constructs a master sample and how ORC, in particular,  
12 constructed theirs.

13 It consists of 360 counties in the coterminus  
14 United States. And the master sample has 360 counties which,  
15 in fact, are 6 samples of 60 counties each.

16 Now, to construct this you take groups of the  
17 country and designated areas. You then, within these groups,  
18 you arrange them in geographical order. Then you arrange  
19 them in order of population.

20 Within each of these geographical areas and accord-  
21 ing to population you then select, with the probability a  
22 portion to size, the counties that will fall into a national  
23 probability sample.

24 Q Now, how is that last selection made? Is that  
25 a random selection?

1 A Yes. It is always a random selection, yes.

2 Q Now, you said in your prepared statement that the  
3 likelihood of a particular sampling unit appearing in the  
4 sample list was dependent on its size or proportionate to  
5 its size. Would you explain that, please?

6 A Naturally, in your representing of your sample is  
7 repetitive of the country as a whole. It represents the  
8 larger counties and in greater number and degree and more  
9 times in a sample they may come up, more counties in that  
10 particular area than would a small county, a small population  
11 size.

12 Q And the sample which ORC selected for the BMI  
13 survey was selected as you have indicated; is that correct?

14 A The sample used in the BMI study was one of the  
15 six probability samples, subsamples within the national  
16 probability sample.

17 It was a fixed sample that had been selected  
18 according to the procedure I have just described.

19 Q And who made the determination as to which of the  
20 six samples should be selected?

21 A One does it randomly.

22 Q And that was done in this case?

23 A That is right.

24 Q Now, after the subsample had been selected, what  
25 happened next?

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1           A     The subsample was selected. There were two sub-  
2 samples selected. Sixty counties which made 120 total  
3 primary sampling units. The first stage that these were  
4 selected they were then matched with telephone directories  
5 to look at what kind of listing we had within those  
6 directories in the Yellow Pages to find bars, restaurants,  
7 taverns and places that were likely to contain jukeboxes  
8 establishments.

9           Q     And would you describe that process a little bit  
10 more? It's in your written statement. I would like you to  
11 just tell the Tribunal how you made your primary establish-  
12 ment for site selection?

13          A     Well, once you determined in the telephone pages  
14 that there were, indeed, this primary sampling unit and  
15 there were 120, as I described, and then you took each of  
16 the telephone directories that matched that city or town.  
17 You listed all of the bars, the taverns and restaurants.  
18 You then made a selection within those of where you would  
19 start your interviewing.

20          Q     And how was that selection made?

21          A     That is done randomly using a random number table.  
22 Your second selection, because you were selecting two  
23 establishments, was done by developing what they call a  
24 sampling interval. In other words, you must go 10 down or  
25 20 down. It is a mathematical calculation of developing a

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1 sampling interval and within that you, again, randomly  
2 select from that group the establishments where you would  
3 start your interviewing. They are called starting indicators.

4 Q Now, were the instructions to the interviewers  
5 simultaneously prepared or prepared before two starting  
6 indicators were identified?

7 I am just trying to get to when the instructions  
8 came.

9 A No. Your instructions come after you have developed  
10 your sample, you have picked your locations. You then  
11 notify the people you are to work with within these loca-  
12 tions. One thing I should mention is that ORC has staffing  
13 in all of the national probability units.

14 They have staffing available, people they have  
15 worked with on a continuous basis in conducting surveys  
16 for them. And you have identified which supervisors you  
17 will use and they will then choose interviewers according  
18 to some specifications. Instructions are not developed  
19 until you have made your first attempt to say how you will  
20 proceed from stage One to stage Two, what you need to do.

21 Q Now, you mentioned supervisors. I assume that  
22 there would be a supervisor for each of the sample units;  
23 is that correct?

24 A That is right.

25 Q And are these supervisors people with whom ORC

1 had worked before?

2 A Yes.

3 Q In every case?

4 A Yes.

5 Q Were they known to you?

6 A They were all known to me. Head of the field  
7 interviewing department at ORC, yes. She's worked with  
8 everyone of them.

9 Q I believe you said that the supervisors then  
10 selected the individual field personnel; is that correct?

11 A That is correct.

12 Q Now, had the field personnel worked for or with  
13 ORC before?

14 A In most cases, I would say 90 percent or 95 percent  
15 had worked on previous studies.

16 Q So these were not people who were recruited just  
17 to do this survey but were part of an ongoing apparatus;  
18 is that correct?

19 A That is correct.

20 Q Now, would you describe how you designate them?  
21 Are they interviewers or field interviewers?

22 A You can call them in this case observers. They  
23 were not actually interviewing per se.

24 Q How were the instructions to the observers  
25 developed?

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1           A     Well, the first stage, as I mentioned earlier, was  
2 in conducting what we call a pretest, and this is the  
3 opportunity to test out what systems and procedures you will  
4 use in collecting your data. We conducted the pretest in  
5 several areasthroughout the country using several different  
6 geographical regions in size, New York, Ohio, which was  
7 Midwestern and then Dallas.

8                     We drew up some preliminary procedures of how we  
9 wanted the interviewers to conduct the survey, of where they  
10 proceeded and how they listed each of the establishments;  
11 the kind of rules of when they were to stand by the machine  
12 and observe it, what manner they were to conduct themselves  
13 in going into the establishment, et cetera.

14                    They are all contained in the instructions. We  
15 then tried them out and that is the basis of refining your  
16 procedures before you conduct the full-scale survey.

17           Q     When you say tried them out, that was what you  
18 referred to as the pretest?

19           A     Right.

20           Q     One the pretest was completed, what happened  
21 then?

22           A     We talked with all the interviewers personally  
23 to ascertain whether they had any problems, what suggestions  
24 they had for making the instructions more clear, whether  
25 there were any problems they encountered in the field,

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1 whether anyone questioned them about what they were doing;  
2 what times were best, a variety of things we had included  
3 in the instructions that we wanted to make sure were  
4 correct.

5 Q And based on that, you developed a final set of  
6 instructions; is that correct?

7 A Yes.

8 Q And are those the instructions which appear appended  
9 to your testimony?

10 A That is right.

11 Q Now, what was done with those instructions once  
12 they were prepared?

13 A Once the pretest had been conducted and the shake-  
14 down of all the procedures had been made, the rest of the  
15 full sample was 120 interviewers were contacted by the  
16 supervisors and the next set of instructions were prepared  
17 and were sent out to the supervisors who, in turn, hand them  
18 to the interviewer and discussed with them their particular  
19 mission in this job.

20 Q Now, would you describe for the Tribunal how each  
21 interviewer or observation was instructed to identify  
22 a particular location and that phase of it?

23 A Yes. They were given what was commonly known  
24 in the trade as a listing sheet and it had on it the name  
25 and address of an establishment that had been ascertained



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1 through our random sampling procedure in the Yellow Pages  
2 telephone book. A starting indicator, they call it in our  
3 trade, was identified at the top of the page and they were  
4 clearly told from there where to proceed.

5 You will go down one mile. You will go till you  
6 find four establishments that are likely to contain jukeboxes.  
7 You will investigate each of the establishments.

8 Q And once that stage was done, what happened next?

9 A The interviewers were instructed that if it appeared  
10 to them that they were listing it during the peak hour they  
11 could go in and do their observation at that particular  
12 time.

13 Q That is at the time of the initial identification?

14 A That is right.

15 Q Could you illustrate for the Tribunal with respect  
16 to a single observer and his instructions, what he would do  
17 and just sort of follow a single observer through so we  
18 can be sure to --

19 CHAIRMAN BRENNAN: . Before you do that, it might  
20 be well to give the reporter a break.

21 We will take a five-minute recess.

22 (Whereupon, a brief recess was  
23 taken.)  
24  
25

1 CHAIRMAN BRENNAN: Mr. Duncan, you may proceed  
2 and take us through a sample procedure.

3 MR. DUNCAN: Thank you, Mr. Chairman.

4 BY MR. DUNCAN:

5 Q I think I asked you, Mrs. Kilkenney, if you would  
6 describe with reference to a particular observer, what he  
7 or she would do once instructions were in hand?

8 A The instructions I mentioned earlier, the first  
9 piece of paper that faces them are their written instruc-  
10 tions. They are gone over by the supervisor and the super-  
11 visor makes sure they have understood what they were doing.  
12 They were asked when they get to the first address to list  
13 all the establishments, the name of the establishment, and  
14 the address of the establishment.

15 So, they go out and they have a starting address.  
16 It says you go to the corner of Main and Pine Street,  
17 Shakey's Pizza Parlor. That is their starting point. They  
18 go to Shakey's Pizza Parlor. They observe whether there  
19 is a juke box present, where it is located, and what probably  
20 the peak playing hours are. They can usually make some  
21 judgment in a bar or a restaurant establishment when the  
22 people are there. It may be near the school and they say  
23 probably the best hours are 3:30 to 5:00, I will listen at  
24 those hours.  
25

Q Could I interrupt? Why did you instruct them to  
*Accurate Reporters, Inc.*

1 listen during peak hours? Is that what you said?

2 A Yes.

3 Q Why did you instruct them to use peak hours?

4 A Well it is like fishing when the fish are running.  
5 You don't want to fish when there are no fish running.

6 Q Okay.

7 A When they got to the establishment on their list-  
8 ing sheet, they include such data as the age and racial mix  
9 of customers, the physical layout, location of the juke  
10 box, and ideal place for observing the juke box. This was  
11 to give them background in case they wanted to go back,  
12 they would have some sense of time.

13 If it was appropriate for that -- inappropriate  
14 for that interviewer to go to that establishment, another  
15 interviewer would be sent there. So this was the kind of  
16 background information it was important to have before you  
17 went in and listened.

18 Q After having identified, say, in Shakey's, that  
19 there was a juke box, what was the next step?

20 A If they were there during the peak hours, they were  
21 instructed that they would listen. They were given a small  
22 notebook which was hopefully unobtrusive so it would not  
23 call attention while they were in the establishment. They  
24 were asked to place themselves close to the juke box so  
25

1 they could actually observe it. They were instructed that  
2 nothing was to be done from memory. They must actually look  
3 at the printout or the actual selection.

4           Someone had mentioned earlier that the number was  
5 important. I don't think we ever instructed them they had  
6 to use the number on the juke box. It was the name, the  
7 title, the record company if that was appropriate, and was  
8 able to be observed.

9           Q     Now, after leaving Shakey's, either finding a  
10 juke box there or no juke box there, what was the next step  
11 that this hypothetical observer would take?

12           A     We would proceed down Main Street until we found  
13 the next possible juke box establishment. We would go in.  
14 It turns out it is a diner. They have individual boxes at  
15 the tables, but there is no way the observer can find the  
16 major juke box place to observe. They then make a note of  
17 this. Why they did not observe in that particular estab-  
18 lishment, and they go on to the next establishment where,  
19 indeed, they find another juke box they can observe.

20           Q     I think that your instructions were explicit as  
21 to how far to go in each direction and how many establish-  
22 ments to locate; is that correct?

23           A     That is correct.

24           Q     And would you repeat for the Tribunal, what those  
25

1 instructions were?

2 A They were told to proceed one mile except for the  
3 rural areas where the milage was extended to 5 to cover a  
4 larger geographical area, obviously where more establish-  
5 ments may be located, and the mile did not have to be a  
6 linear mile. You could zigzag a bit. It was up to them  
7 to understand the contour, if it was a shopping mall, for  
8 example. They were told to try to identify four listening  
9 establishments and make observations of one hour at each of  
10 the establishments.

11 Q And if there were less than four, what were the  
12 instructions?

13 A If there were less than four, they could make  
14 two hours in one establishment and one in the other two.  
15 That makes three establishments. It was written very clearly  
16 how this would work.

17 Q What would happen in the case of an observer who  
18 located no juke box establishments within their geographic  
19 area?

20 A That was an observation in itself. There were  
21 three instances where we called them "fall out of the  
22 sample," where there just were no juke boxes whatsoever.

23 Q Now, you mentioned an unobtrusive spiral notebook.  
24 Tell the Tribunal with particularity what was to be recorded  
25 in that notebook?

1           A     They were asked to record the name of the song,  
2     the name of the artist, the name of the recording company  
3     if it was possible to see all of that. They were also  
4     asked to record the type of establishment. They would  
5     use a code for that. They were asked to put a code in terms  
6     of the starting point. It was all done by geographical  
7     region, primary sampling unit that later could be data  
8     processed.

9           Q     Now, were there any instructions given as to  
10    timeframe, time within which the observation should be  
11    made, I mean days of weeks?

12          A     Yes, there was a timeframe. A deadline was given  
13    establishing that we expected them to complete and send back  
14    to ORC directly their notebooks and their listing sheets,  
15    and that was given a four-week period.

16          Q     What was the time span over which the actual  
17    observations were made?

18          A     Let me quickly refresh my memory here. The full  
19    scale field work started on March 16th, and it was scheduled  
20    to end March 30th, and there were some final ones that  
21    didn't get finished until around April 10th or 12th.

22          Q     I invite your attention to page 3 of your testi-  
23    mony at the bottom, the line which says "final delivery of,  
24    results to Data Tab Inc." It says March 14.

1           A     It is obviously a typographical error. It should  
2 be April 14, 1981.

3           Q     Now, after the field observers had made their  
4 observations, what happened next? What was the next step  
5 in the process?

6           A     The next step was to send their work directly  
7 to opinion research where the listing sheets were looked  
8 at in terms of the kind of information that was asked for.  
9 The notebooks were looked at in terms of quality of the  
10 information, was it readable, did it contain the informa-  
11 tion that we asked for, etcetera.

12                     They were then logged in, packed up and sent off  
13 to Data Tab for processing.

14           Q     Now, I take it from what your answer was that  
15 each observer sent his or her notebooks and listing sheet  
16 directly back to ORC?

17           A     That is correct.

18           Q     They did not go through the supervisor; is that  
19 correct?  
20

21           A     That is correct.

22           Q     Now, as you recall or referring to your report,  
23 how many establishments were observed? How many listening  
24 hours were involved and what did you get back at the end  
25 of all of this?

1           A     Eight hundred eighty-five listening hours, and  
2 755 establishments.

3           Q     And how many books did you get?

4           A     Two hundred and thirty-six, one of which was a  
5 duplicate, and four of them for which there were no book-  
6 lets at all. Three of them I have described as what we  
7 call "fall outs." There were no juke boxes in three areas,  
8 three in North Carolina, one in Virginia. One notebook  
9 and listing sheet from Wisconsin got lost in transit and it  
10 never arrived.

11           MR. DUNCAN: Mr. Chairman, I don't quite know what  
12 to do from an evidentiary point of view. There are a number  
13 of notebooks on the table here. Would you come and take a  
14 look at these and tell me whether you have seen them before?

15           THE WITNESS: (Perusing.)

16           Yes.

17           MR. DUNCAN: Mr. Chairman, I don't propose to  
18 introduce all of these into evidence. I do, however, want  
19 to make available to the Tribunal a representative sample,  
20 just so that the Tribunal can see what was what. And I  
21 wonder if Mr. Korman would stipulate with me that at his  
22 request I made these documents available to him, and that  
23 he, through his agents, copies seven of them. And I would  
24 like to offer those seven in evidence just by way of  
25



1 illustration, just so that the record will be complete.

2 MR. KORMAN: Mr. Chairman, I will certainly  
3 stipulate that I believe it was last Friday Mr. Cone visited  
4 Mr. Duncan's office and made copies of seven books, which  
5 I assume are the same seven. And I don't know what the  
6 appropriate time is for me to object to all of this, but  
7 I suppose I might as well do it now.

8 I do object to the survey being introduced on  
9 ground A that it relates to 1981 performances, and Mr.  
10 Kramer has testified that in his view there were probably  
11 no records in the juke boxes in March of 1981 that have  
12 been in 1979.

13 Beyond that, there are problems with the random-  
14 ness of this sample which we will come to, I guess, later.  
15 I merely want to note my objection, and I would like to  
16 continue with the testimony. And as we go along, I will  
17 renew this objection and ask for a ruling at a later date.

18 I would also like to ask my friend, Mr. Duncan,  
19 to make available all of those books because the seven that  
20 we have seen suggest quite serious infirmities.

21 MR. DUNCAN: They were all made available, Mr.  
22 Korman.

23 MR. KORMAN: There wasn't time, as you know, on  
24 Friday for us to copy all of them. I merely ask that you  
25

1 permit us to copy all of them at a later date together,  
2 Mr. Duncan, with all other data that was prepared in con-  
3 nection with this survey, whatever computations, whatever  
4 was done, we would like to have.

5 MR. DUNCAN: Mr. Chairman, I did offer on Friday --  
6 Mr. Korman called me on Thursday and a representative from  
7 Nathan Associates came by the office on Friday and we made  
8 these books available. There was not, at that time, time  
9 to copy them although we offered to let them do so at that  
10 time.

11 If they wish to copy them now for further use,  
12 that same offer still stands. So far as other data, what  
13 we did make available were two documents compiked by Data  
14 Tab about which there will be testimony later. We did not  
15 make available, and would not offer to make available,  
16 worksheets from which the Data Tab documents were compiled.

17 The testimony here is, and will be, that these  
18 are the books that were received as a result of ORC's  
19 operations, and as the witness has already said, these  
20 books were sent to Data Tab for whatever use Data Tab made  
21 of them. So, I assume I am complying with Mr. Korman's  
22 request, but I just want to be perfectly clear on it.

23 MR. KORMAN: Well if my request is complied with as  
24 it reads when we get the transcript, I am delighted. As I  
25

1 say, Mr. Chairman, it will take some time to analyze this,  
2 and if our motion to exclude all of this should be denied  
3 that will bear, I think, on the appropriate time for re-  
4 buttal.

5 MR. DUNCAN: I am forced to comment that the exis-  
6 tence of the survey has been known to Mr. Korman at least  
7 since the time of our prehearing submission. It was not  
8 until Thursday of last week that he first requested to see  
9 the backup data, and it has been available and would have  
10 been available to him all that time. If he is suggesting a  
11 delay in these proceedings, I would object.

12 CHAIRMAN BRENNAN: There is nothing pending at the  
13 present time which requires any ruling by the Chair.

14 Mr. Duncan, if you want to give us those seven  
15 books to review, that meets with our approval.

16 MR. DUNCAN: And I would suggest in line with what  
17 Mr. Korman said that after this witness is finished and  
18 after the witness from Data Tab is finished, I will move the  
19 survey into evidence, and if there is an argument at that  
20 time, we will be prepared to meet it.

21 I would like the reporter to mark as Exhibit 1  
22 a group of seven spiral notebooks.

23 MR. KORMAN: Mr. Chairman, I have no objection to  
24 those going in, but if the survey is being printed in  
25

1 evidence, I assume it is going to be the entire survey  
2 including all of the books.

3 MR. DUNCAN: I will be glad to move all of the  
4 books into evidence. In fact I will offer them at this  
5 point although they are not copied. I will offer all of  
6 the books into evidence.

7 MR. KORMAN: May I respectfully request a delay  
8 in the ruling on that, Mr. Chairman, because, as will be-  
9 come evident on cross-examination, we have reason to think  
10 that the survey is seriously defective, and I would hope  
11 to persuade the Tribunal that the whole survey will be  
12 excluded.

13 I can't do that at this time, but I don't think  
14 a basis has been established for admitting it into evidence.  
15 All it is, so far, are some booklets that somebody prepared  
16 and I would like to examine, on cross-examination, just  
17 what it is that was done and how the identifications were  
18 made and by whom of the compositions said to be BMI composi-  
19 tions.  
20

21 MR. DUNCAN: We would certainly anticipate that  
22 that would be done on cross-examination. I am merely offer-  
23 ing them in evidence at this time, and I would join in with  
24 Mr. Korman that the ruling as to whether they be admitted  
25 be made at an appropriate time.

1 CHAIRMAN BRENNAN: Fine, and this is Exhibit 2,  
2 Mr. Duncan.

3 MR. DUNCAN: I'm sorry.

4 (Whereupon, the documents referred  
5 to were marked as Exhibit 2 for  
6 identification.)

7 MR. DUNCAN: I had requested that that be included  
8 as part of the original admission of this witness, but if  
9 it can be separately marked, that will be fine.

10 MR. KORMAN: I would like to ask that it be marked  
11 as Exhibit 1. I still haven't read it. It is an 18-page  
12 submission --

13 CHAIRMAN BRENNAN: The Chair has already done so,  
14 Mr. Korman.

15 (Whereupon, the documents referred  
16 to were marked as Exhibit 1 for  
17 identification.)

18 CHAIRMAN BRENNAN: Mr. Duncan, I trust there is  
19 a book here from Texas, New Hampshire, Wisconsin?

20 COMMISSIONER BERG: No, Wisconsin got lost in the  
21 mail because we have a Republican Governor.

22 MR. DUNCAN: Those are the seven books that the  
23 Nathan Associates people chose to copy. So, we thought we  
24 would use them to save time.

25 CHAIRMAN BRENNAN: Would you indulge us for a  
few minutes?

1 COMMISSIONER BERG: There were two Wisconsin  
2 listings on your list, one from South Milwaukee and another  
3 one. Which one was lost in the mail, just as a matter of  
4 personal curiosity?

5 THE WITNESS: I don't think I can answer that,  
6 unfortunately.

7 CHAIRMAN BRENNAN: The Chairman has clam bar in  
8 Brooklyn.

9 You will have to indulge us for a few minutes.

10 (Pause in proceedings.)

11 MR. KORMAN: Mr. Chairman, Mr. Zelenko calls my  
12 attention to the fact that in the prehearing statement  
13 which I received on May 23rd, the documents which were  
14 supposed to be introduced into evidence on page 3 are  
15 specified. Exhibit 1 is the juke box observation study  
16 field report. Exhibit 2 is something by Data Tab Corporation  
17 as to how they processed it. Exhibit 3 is a report.  
18 Exhibits 4 and 5 are summary of 1981 and 1979 trade chart  
19 reports, respectively.  
20

21 The books were not listed, nor intended to be put  
22 in. When Mr. Duncan suggested putting in seven, I felt I  
23 had to ask that all of them go in. But Mr. Zelenko points  
24 out to me that we haven't really seen them, and I am not  
25 at all sure that we are proceeding in accordance with the

1 Tribunal's rules here.

2 I would like some guidance from the Chair. What  
3 I would really like to do is have an opportunity to examine  
4 these books. We have seen seven. You now have the seven  
5 and we will point out to you there are problems with them.  
6 But before they are offered, Mr. Chairman, I would like  
7 guidance from you as to whether you think it is appropriate  
8 that they should be offered, not having been identified  
9 as exhibits that would be offered and exchanged.

10 MR. DUNCAN: Mr. Chairman, may I respond to that?  
11 I think it is --

12 CHAIRMAN BRENNAN: Yes.

13 MR. DUNCAN: I think it is perfectly clear to  
14 Mr. Korman that the exhibits which we intend to introduce  
15 here under tabs 2, 3, and 4 of our prehearing statement,  
16 these books, the Data Tab listing and title and the Data  
17 Tab summary is back up or input information which, under  
18 the rules as I read them, we were not required to produce  
19 at all. Mr. Korman called me and asked if he could see the  
20 back up and input data. He specifically asked to see the  
21 little spiral notebooks, and I made them available to him  
22 within 24 hours of his request.

23  
24 I don't understand an objection now based on the  
25 fact that they hadn't been previously exchanged. The only

1 thing the commission's rules require input data and backup  
2 data to be introduced. The exhibit on which Mrs. Kilkenny is  
3 testifying is the report that we filed in our prehearing  
4 statement and if Mr. Korman doesn't want the box in evi-  
5 dence I move to withdraw them.

6 I thought that it would be of help to the commis-  
7 sion and to counsel to actually see the documents on which  
8 the exhibit was based.

9 MR. KORMAN: Mr. Chairman, my understanding of the  
10 rules is that if documents are going to be relied on at a  
11 hearing, they should be exchanged. They should be exchanged  
12 in advance of the hearing. I don't believe I should have  
13 had to ask to see the backup. If the backup was going to  
14 be used at all, it should have been shown to counsel for  
15 each claimant, not just to me. Mr. Ciancimino has still  
16 not seen them, nor has Mr. Angel.

17  
18 Mr. Chairman, if I may suggest a solution. We  
19 have seen seven. I have no objection to those seven going  
20 in. I would like an opportunity to see the others.

21 CHAIRMAN BRENNAN: It was the Tribunal's intention  
22 to rule to admit the seven books which will now be done  
23 without objection.

24 MR. DUNCAN: May I use them?

25 CHAIRMAN BRENNAN: Yes.



1 BY MR. DUNCAN:

2 Q Mrs. Kilkinny, you had testified earlier and in  
3 your written statement that after you received these books  
4 that there were certain quality control statements.

5 Could you elaborate on that please? What was  
6 done with these books after you got them and before you  
7 sent them to Data Tab?

8 A Well as customary in any survey, the data that is  
9 collected either through observation or through a survey  
10 instrument, is examined for clarity, for completeness and  
11 for legibility. And in some cases, the more complicated  
12 ones, for how the responses were adhered to in terms of the  
13 patterns that were developed. In this case, they were really  
14 looked at in terms of the legibility, clarity, whether the  
15 information that was asked for was indeed there, and if  
16 there is any question. These are returned by call to the  
17 interviewer to say we don't understand what happened here,  
18 et cetera.

19  
20 That is the quality control process. You go back  
21 and you check with the person who collected the data to find  
22 out if there are any flaws, what they were and why.

23 Q Was that done with respect to any of the observers  
24 in this case?

25 A Yes.

1 Q Were there any books which you couldn't use,  
2 because, for example, they were illegible?

3 A Not to my knowledge.

4 Q After you had processed the books in the way that  
5 you described, what did you then do with them?

6 A We made record of the book, the identification  
7 number, location number, and sent them off to Data Tab,  
8 shipped them directly to Data Tab.

9 Q And did you have any involvement in the process-  
10 ing of the books, whatever that consisted of by Data Tab?

11 A No, none whatsoever.

12 Q Is it your testimony that your role or ORC's  
13 role and your part of the survey ended when you sent the  
14 books to Data Tab; is that correct?

15 A Yes, that's correct.

16 Q In your opinion, based on your experience, what  
17 does the information in these books reflect?

18 A It reflects observations of the juke box selec-  
19 tions at establishments that were randomly selected through  
20 our sampling procedures, and the name and title and the  
21 singer and the record company in terms of their observations.

22 Q And from your point of view, would it be fair to  
23 say that they reflect play selections in accordance with the  
24 instructions which you gave?  
25

1           A     Yes, they do.

2           MR. DUNCAN: Your Honor, at this time, we would  
3 like to offer into evidence the Juke Box Observation Study  
4 Field Report prepared by Opinion Research Corporation. It  
5 consists of several sets of numbered pages. It is about  
6 15 pages in all. But it is that information that is con-  
7 tained under Tab 1 in BMI's prehearing statement.

8           CHAIRMAN BRENNAN: And you wish this identified  
9 as a separate exhibit?

10          MR. DUNCAN: Yes, Your Honor. I will offer that  
11 as Exhibit 3.

12          CHAIRMAN BRENNAN: Without objection, so ordered.  
13  
14                               (Whereupon, the document referred  
15 to was marked as Exhibit Number  
16 3 for identification.)

17          MR. DUNCAN: No further questions, Your Honor.

18          CHAIRMAN BRENNAN: Thank you.

19                               Commissioner Coulter?

20          COMMISSIONER COULTER: Just a couple, Mrs.   
21 Kilkenny.

22                               Did anybody check up on these observers? Did  
23 somebody else actually watch somebody listen to juke boxes?

24          THE WITNESS: Only during the pretests. However,  
25 I should qualify that by saying that the listing sheets are  
used for a quality control measure or a validation measure

1 that actually those establishments did exist. At any time  
2 you can take your listing sheets and go back to that lo-  
3 cation and go validate the number of places that were listed,  
4 and you have to assume that they were observed within those  
5 locations.

6 The listing sheet gave us the address, the name  
7 of the establishment, the type of establishment and all that  
8 information.

9 COMMISSIONER COULTER: And these were established  
10 by your observers?

11 THE WITNESS: They were a form that had to be  
12 filled out by the observer, that's right.

13 COMMISSIONER COULTER: But nobody else checked up  
14 on each of those?

15 THE WITNESS: No.

16 COMMISSIONER COULTER: The people you got just  
17 worked one night apiece, right, everybody just worked one  
18 evening?  
19

20 THE WITNESS: Some of them worked two different  
21 days. It depended on the number of establishments they  
22 had, and how difficult they were to locate. And if they  
23 found three that they had that had peak hours in the evening,  
24 they had to spread it between three nights or two nights.  
25 I think they probably worked two nights more than one.

1 COMMISSIONER COULTER: How did you recruit your  
2 people?

3 THE WITNESS: They were recruited through the  
4 local supervisors that we have as part of our stamping of  
5 our national probability sample. These supervisors are used  
6 by any other -- many other organizations. They are not  
7 unique to OPR. They are in place already. The staff is in  
8 place already. Many of the observers have probably worked  
9 on many studies for us before.

10 COMMISSIONER COULTER: Did it occur to you in  
11 approaching your sample at any point to use whatever infor-  
12 mation we have about location listings at the Tribunal?

13 THE WITNESS: I think some mention was made of it,  
14 but to the best of my recollection, I think my recollection  
15 was that those were confidential, that we weren't able  
16 to access lists entirely or that was my vague recollection  
17 of it. That was not a sampling frame we had access to is  
18 what I am saying.

19 MR. KORMAN: I am having great trouble hearing  
20 the colloquy, I'm afraid.

21 THE WITNESS: I said I wasn't sure that that list  
22 was available to us.

23 MR. KORMAN: The Tribunal's location list, is  
24 that what is being discussed?  
25

1 THE WITNESS: That is what is being discussed. My  
2 recollection is somewhat vague. It was just mentioned.  
3 I don't think it was accesible to us.

4 COMMISSIONER COULTER: Just to be accurate, you  
5 could have indicated where you wanted locations, and we  
6 could have drawn a sample on our own listing which you would  
7 have had access to.

8 THE WITNESS: I don't recall enough of the detail  
9 to comment at this time.

10 COMMISSIONER COULTER: You weren't aware of that?

11 THE WITNESS: No.

12 COMMISSIONER BURG: Mrs. Kilkenney, first of all,  
13 explain to me pretesting. Why did you choose the four  
14 cities you did for the pretest? I think more specifically  
15 in that question, why two cities in one state, for instance?  
16

17 THE WITNESS: I think the selection was basically  
18 geographical. We wanted to use three different locations.

19 COMMISSIONER BURG: Three different states?

20 THE WITNESS: Yes. We wanted to use one which  
21 was the largest city. One was Dallas, which is a counter-  
22 part in a different location. And I think in Ohio, one  
23 was a very small area. We wanted to test some procedures'  
24 there.

25 COMMISSIONER BURG: They both sound small. One

1 is Fairborn, and the other is Yellow Springs. It is not  
2 a Cleveland or Toledo.

3 THE WITNESS: I don't know how small it is. It  
4 probably is more suburban and the other one was more rural.

5 COMMISSIONER BURG: To get back to the line of  
6 questioning that I directed to Mr. Kramer this morning,  
7 dō you consider the total of 885 listing hours and 758  
8 juke boxes, in your estimation, is that a valid survey?

9 THE WITNESS: Yes, it was a representative sample  
10 of the locations where we went, yes. You had more obser-  
11 vations than what is said there. The hours are 885. How-  
12 ever, within those hours you also had X number -- I don't  
13 know the total number of actual observations of selections'  
14 within those hours.

15 COMMISSIONER BURG: I think it was 5,730 plays.

16 THE WITNESS: That certainly is a valid sample.

17 COMMISSIONER BURG: This is more than just your  
18 opinion. That observation would hold in your profession,  
19 everyone would consider that a valid sample?

20 THE WITNESS: Let me say this. I am not a stat-  
21 ician. I have not purported to be able to rule on validity,  
22 on reliability. I would leave that up to the statician,  
23 who is Dr. Link. I would refer to his judgment on that.

24 MR. KORMAN: I'm sorry, I missed the name.  
25

1 THE WITNESS: Dr. Link.

2 COMMISSIONER BURG: Did you have any problems,  
3 Mrs. Kilkenney, taking a survey in 1981 that was to show  
4 something that took place in 1979?

5 THE WITNESS: I don't believe that we ever under-  
6 stood that you were trying to say what happened in 1979.  
7 We knew there was some involvement of charts. We were  
8 commissioned to do a study in 1981.

9 COMMISSIONER BURG: Thank you.

10 COMMISSIONER COULTER: I'm sorry. When you said  
11 you knew there was some involvement with charts?

12 THE WITNESS: Well, charts have been discussed in  
13 a very broad sense, and I am really not too familiar with  
14 the music business. So, if I sound like I was naive at the  
15 time of your terms, I realize the terms have been mentioned  
16 in connection with data collection at the early part of the  
17 discussion, but that those were not acceptable to the  
18 Tribunal.

19  
20 I think that was my recollection. But the survey  
21 we were doing involved actual observations on site.

22 COMMISSIONER COULTER: But the issues of '79  
23 versus '81 didn't emerge as far as the charts were concerned.

24 THE WITNESS: I don't recall the detailed discussion.

25 COMMISSIONER GARCIA: Had that come up would your



1 procedures have been any different?

2 THE WITNESS: I don't think so, but I would like  
3 to again defer to Dr. Link since he was primarily involved  
4 in the sample.

5 COMMISSIONER GARCIA: Tab 1 that is just been in-  
6 troduced under sample location, those numbers next to the  
7 city, is that the number of locations you visited, or number  
8 of juke boxes? What do those numbers stand for?

9 THE WITNESS: I believe they were number of obser-  
10 vations in that area. In Norwalk there were seven obser-  
11 vations which meant there were two locations, and he probably  
12 did three in one and four in the other and that is true all  
13 the way down the list.

14 COMMISSIONER GARCIA: Explain that to me, three in  
15 one and four in the other.

16 THE WITNESS: In other words, in each of the  
17 primary sampling units there were two locations picked out.  
18 They were to try, ideally to do four in each area, and  
19 here they obviously only did three in one area, and four  
20 in the other, which was acceptable to us.

21 COMMISSIONER GARCIA: I see.

22 COMMISSIONER BURG: Mr. Chairman, I did forget  
23 one question. I believe you said that the margin of error  
24 was plus or minus 2 percent. Is that representative of  
25

1 margins of errors in most surveys?

2 THE WITNESS: I think in general that would be a  
3 very acceptable margin of error, but I really don't think  
4 I am prepared to comment on the margin of error as I  
5 mentioned before. I would rather have someone else do it.

6 MR. DUNCAN: Madam Chairman, I don't think this  
7 witness said the margin of error was 2 percent.

8 COMMISSIONER BURG: No, no, no. I know that. It  
9 was in here some place. I'm sorry if I misrepresented that.  
10 I read it in here, and I was just questioning her about  
11 that.

12 CHAIRMAN BRENNAN: We will save that for the  
13 missing link.

14 Mr. Korman.

15 CROSS-EXAMINATION

16 BY MR. KORMAN:

17 Q Ms. Kilkenney, everyone testifying in the role  
18 that you have was asked about their educational background.  
19 Would you tell us yours please?

20 A Yes. I attended Manor Color, in Fox Chase,  
21 Pennsylvania. I got an Associate of Arts degree. I con-  
22 tinued my education at Temple University in the area of  
23 elementary education. I did not finish my degree.

24 Q You are not a super duper survey expert type?

1 A Well, it depends on where you are sitting.

2 Q Are you, in terms of let's say --

3 A I would say after 13 years experience I would  
4 consider myself a reputable survey type.

5 Q In terms of administering a survey or designing  
6 one?

7 A It depends on what you are talking about, design-  
8 ing a survey. You mean deisgn -- You may be designing  
9 procedures or doing the sample design.

10 Q You testified, I believe, that after the sample  
11 design and sample frame had been agreed upon, they had 120  
12 primary sample units chosen.

13 A That's right.

14 Q Who agreed upon the sample design?

15 A Dr. Link and ourselves at a meeting.

16 Q And was it Dr. Link -- who besides you was  
17 present?

18 A Dr. Zdep, Gerri Spiller and Paul Flier, the  
19 staff statician.

20 Q Are they the experts, rather than you, in the  
21 area of sample design, or sample frame or are you equally  
22 expert?

23 A I would not say Dr. Zdep or Gerri Spiller were  
24 expert in sample design. Paul Flier is a statician and  
25

1 understands the principles and how to carry out instructions  
2 in terms of choosing the sample.

3 Q Who are the design experts at ORC who were at the  
4 meeting?

5 A Are you talking about the sample design?

6 Q Yes.

7 A I am talking about Dr. Link and our statistician,  
8 Paul Flier.

9 Q And you?

10 A I didn't say I was an expert in design, no.

11 COMMISSIONER BURG: Would you speak up a little  
12 more please?

13 THE WITNESS: Yes.

14 BY MR. KORMAN:

15 Q I believe you testified that the proposal was  
16 made on February 9, 1981 and the contract incorporating the  
17 proposal was signed on February 23, 1981; is that right?  
18

19 A I don't recall the date the contract was signed.

20 Q Do you remember what price this survey was?

21 A Yes, \$44,000.

22 Q That was ORC's part only?

23 A The survey, yes.

24 Q And can you briefly describe what it was you were  
25 to do for that \$44,000? Is it just what has been described,

1 or did it go beyond that?

2 A No, it was exactly as described. We were respon-  
3 sible for choosing the sample, for conducting a pretest,  
4 for training the interviewers and conducting the actual  
5 field work, collecting the data back at ORC, the notebooks  
6 in this case, and seeing that they were shipped off to Data  
7 Tab for processing.

8 Q Did you write the juke box observation study for  
9 ORC?

10 A Did I write what?

11 Q This exhibit?

12 A No, I did not.

13 Q You didn't draft this?

14 A Yes, I do.

15 Q Who was it?

16 A Gerri Spiller, who is a research director at  
17 Opinion Research Corporation.

18 Q Is he an expert in designing random samples?

19 A She is not an expert in designing random samples.

20 Q In the first paragraph under study design, do you  
21 have a copy before you?

22 A Yes, I do.

23 Q Would you read the first paragraph, please?

24 A Under study design?

1 Q Yes.

2 A "Findings in the study are based --

3 Q Not out loud. And then I will ask you a question  
4 or two after you have finished.

5 (Pause.)

6 In the second sentence it states that observations  
7 took place in a representative sample of public establish-  
8 ments in which juke boxes are found. Do you understand that  
9 representative sample to be the same as a randomly selected  
10 sample?

11 A Well, considering that one does not have any  
12 accessibility to the universe of juke boxes and juke box  
13 establishments in this country, one certainly couldn't say  
14 that you were representing the entire establishment -- juke  
15 box establishments. You were, in fact, within the sample  
16 constraints of a national probability sample representing  
17 what existed within those primary sampling units only.

18 Q Well, what were the limits of discretion that the  
19 investigators were given to choose the places they would go  
20 into. There were a number of them, were they not?

21 A I don't know what you mean by discretion, for  
22 example.

23 Q Well, for example, these people were asked not to  
24 go into places they considered to be dangerous, is that  
25

1 correct?

2 A Yes.

3 Q They were asked not to go into places that they  
4 thought were unlikely to have juke boxes; is that correct?

5 A Well, I think that was clearly spelled out that  
6 if they were places like a dress shop or pastry shop they  
7 weren't places that were likely to contain juke boxes.  
8 I might say too, the question of whether they thought it was  
9 dangerous was usually by going into the place and making  
10 some observation that they were really probably out of  
11 place there.

12 Q Who were these people? How would you generally  
13 describe the investigators? For example, are they part-time  
14 workers primarily? I don't know whether it is a sexist  
15 word to use the term "housewives."

16 A I think in this case you would find that we had  
17 suggested that it would probably be more appropriate to  
18 use male interviewers, observers.

19 Q You had suggested it. Do you know whether most of  
20 the investigators were male or female?

21 A No, I don't know whether they were male or female.  
22 I think they were probably, as I recall, half and half.

23 Q I notice that the investigators were allowed a  
24 reimbursable expense of only \$1.25 to keep them in a place  
25

1 for an hour. Whose determination was it that that would be  
2 the limit for which they would be reimbursed?

3 A It is ORC's decision.

4 Q Could you tell me why it was \$1 and a quarter ra-  
5 ther than \$5 or \$10?

6 A I think that is perfectly obvious. You have  
7 budget limitations.

8 Q ORC didn't have a budget limitation. BMI, I  
9 suppose might have had one.

10 A I don't know where you want to place it. There was  
11 a limitation.

12 Q I want to place it somewhere. Where would you  
13 place it, BMI or ORC who said \$1 and a quarter?

14 A ORC clearly decided on the dollar and the quarter.

15 Q In your opinion might that not bias the result?

16 A Pardon me. I don't understand your question.

17 Q If I were an investigator and I were given the  
18 choice between spending an hour in a place that was a teen-  
19 age place where I could nurse a Coca Cola that might cost  
20 me 75¢ or 50¢ for an hour and going into a bar where I  
21 might have to pay \$2.50 of which \$1 and a quarter would be  
22 my own money, I would go into the teenage place, would you?

23 A Would you expect, though, that other people might  
24 respond that way?  
25



1           A     I think the answer was that if they found the  
2 money that we had allocated was inadequate, if they had  
3 to pay a fee to get into the place, if it was reasonable.  
4 I am not speaking of cover charge in some night club, I am  
5 speaking of a dollar to get into a dance establishment.  
6 They were to call to get permission to be authorized to spend  
7 more money. Supervisors took care of this. They would  
8 inform us if they felt it was inadequate.

9           Q     And were there such places where it was called to  
10 their attention?

11          A     I believe there were several cases, but it was not  
12 contained in a report. It was a sporadic sort of thing, a  
13 few cases. They always had an opportunity to call us and  
14 tell us that this was unreasonable, and we could always  
15 adjust accordingly.

16          Q     Might it bias the result that you were dealing in  
17 a smaller area and directing people to go to the business  
18 area of the city?

19          A     I think as I recall in my testimony, I didn't  
20 suggest that we necessarily said to go to the business area  
21 of the city. We selected the starting location randomly  
22 from a list of all the establishments that were bars, taverns,  
23 restaurants within the Yellow Pages Directory.

24          Q     But that is for the starting point. Then they were  
25

1 directed to walk towards the business commercial area from  
2 that starting point, were they not?-

3 A They were within one mile to follow a path within  
4 one mile, yes.

5 Q Would it have any effect on the result if I were to  
6 suggest to you that at least in some areas of the country  
7 there is a territoriality to juke box operators? That is  
8 to say that an operator will have an area into which other  
9 operators will not venture. And if you were to send an  
10 investigator to four places within the distance of a mile or  
11 less that you would, in fact, be investigating the same  
12 juke box operator's establishments. Would that affect your  
13 thinking about this?

14 A I have no knowledge about that. I'm sorry.

15 Q Would the fact that only two weeks of the year  
16 were involved here, two weeks in March of 1981, would that  
17 affect the usefulness of this survey? Do you think?

18 A Well, we had two constraints placed upon us. One  
19 was the time factor, and the other was from our judgment,  
20 and we were really ranked amateurs at it. We wanted to do  
21 it in a period of time that we considered neutral, so we  
22 tried to avoid anything that would be around a holiday  
23 season. Maybe our assumption was wrong. I don't really know.

24 Q By the way, I notice in one of those books that  
25

1 one of the investigators was present at an establishment on  
2 St. Patrick's Day, did you notice that?

3 A Yes, I saw that.

4 Q And did you notice that the composition, when  
5 Irish Eyes Are Smiling, was reported to have been played  
6 10 times?

7 A I don't think I recall that.

8 Q Would you please look at book 14 and I think  
9 everyone has one of those before it.

10 CHAIRMAN BENNAN: Off the record.

11 (Whereupon, a discussion was held off the record.)

12 BY MR. KORMAN:

13 Q Ms. Kilkenney, if you will turn to the third page  
14 in the upper right-hand corner, there is a notation, "All  
15 the Irish songs were played over and over." And someone  
16 has written, "Please note this." And just below the middle  
17 of the page, you see, "When Irish Eyes Are Smiling, Bing  
18 Crosby, played about 10 times."  
19

20 Do you see that?

21 A Yes, I see it.

22 Q Does that follow the instructions given to the  
23 investigators?

24 A I see nothing to suggest it would not be within  
25 what the investigator is told to do, to make that observation.

1 Q Well, let me be more precise.

2 It says, "played 10 times." Does it make a dif-  
3 ference whether it is eight or eleven?

4 A Yes, I would say he could be more precise.

5 Q Shouldn't they have had the precise number?

6 A Correct.

7 Q And shouldn't they really have listed each per-  
8 formance because I assume it wasn't played 10 times over  
9 and over again, but probably there were other things inter-  
10 spersed. Let me ask, were the instructions to list each  
11 title as it was performed?

12 A I believe the instructions said that, but I will  
13 have to check them to be sure.

14 Q On that same report, page 7, I think of the  
15 instructions, Instruction 4 on page 7 says, "Song title,  
16 artist, recording company, if available, and song writer or  
17 composer, if available, for each selection played during  
18 your observation - hour."

19 Do you see that?  
20

21 A Yes, I see it.

22 Q So, this person did not comply with those instruc-  
23 tions, correct?

24 A This that one instance, yes, I see that very  
25 clearly. I do see When Irish Eyes Are Smiling.

1 Q And you see it says, "played 10 times." And up  
2 above it says, "All the Irish songs were played over and  
3 over." Now, what kind of computation is possible from  
4 that report, do you think?

5 A I think they have listed the plays. They have  
6 listed the number. They have gone on and they have listed  
7 all the Irish songs. That is all they were telling us, is  
8 that this was an unusual circumstance where songs were  
9 played over and over.

10 Q Wouldn't it have been easier to handle by list-  
11 ing the titles as they were played?

12 A They seem to be playing that except on When  
13 Irish Eyes Are Smiling. You are right. That is unclear.  
14 I don't know how to answer that. It would have been better  
15 to have listed it each time. You are correct. Strict  
16 procedures would have said list it each time.

17 Q Well, they did, but the person just didn't do it,  
18 I gather.

19 Now, in the summary, when this data finally got to  
20 the end, those 10 performances were treated as one. That  
21 was not ORC's responsibility, but when you look -- And,  
22 Mr. Duncan, you have given me the summary. I am just saying  
23 that is not OCR's responsibility, but would you agree with  
24 me that it is an error of some size?  
25

1           A     I think that when it comes to --

2                   MR. DUNCAN: Your Honor, I am going to object to  
3 that question. I think the witness testified that they  
4 shipped the books to Data Tab and had nothing to do with it  
5 after it got to Data Tab. I think this is an excellent  
6 question to put to Data Tab, and not to this witness.

7                   CHAIRMAN BRENNAN: The Chair will take its ruling  
8 by calling counsel's attention to the last song listed  
9 which is by Tony Bennet, As Time Goes By. We will recess  
10 until 10 o'clock tomorrow morning.

11                   (Whereupon, the hearing was adjourned at 4:20 p.m.  
12 to reconvene at 10 o'clock the following morning.)  
13  
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Exhibit B  
6-2-81 BRP

3918

ROSENMAN GOLDMARK COLIN & KAYE

575 MADISON AVENUE, NEW YORK 22

SAMUEL I. ROSENMAN  
GODFREY GOLDMARK  
RALPH F. COLIN  
SYDNEY M. KAYE  
WALTER J. PETSCHER  
MAX FREUND  
RICHARD S. SALANT

MURRAY HILL 6-7600

October 29, 1951

Samuel J. Silverman, Esq.,  
575 Madison Avenue,  
New York 22, N.Y.

TV-ascap

SEARCHED	INDEXED	REFLECTED
SERIALIZED	FILED	
OCT 30 1951		
FBI - NEW YORK		
TOBY J. SILVERMAN		
MANHATTAN REPORTING		
D-29		

Dear Sam:

You asked me to put into written form a rough outline of the presentation I made at our meeting on Thursday relating to factual preparation for the rate-fixing proceeding.

Devoid though we are of precedents, the issue is the simple one that presents itself in every horse trade. What are the stations being offered? What are they being asked to pay? What use are the stations making of the commodity and what is the market for similar products? Despite the discouraging factors which are present, I believe that substantial stress should be laid upon the excessive amount of the blanket fee demanded. The available sources of information are:

1. Analysis of questionnaires addressed to the committee's member stations.
2. Information compiled by NARTB.
3. Information compiled by BMI.
4. Information gathered through examinations before trial of ASCAP.
5. Information produced by independent research studies.

Obviously much of the testimony must be presented by experts and, therefore, the retention of research organizations, research people in academic life and certified public accountants would appear to be necessary. Among the useful information we should gather is the following:

a) A full analysis must be made of ASCAP's demands both as to blanket and per program licenses. These demands must be studied in the light of the term of the licenses tendered, the term for which ASCAP holds its rights and the effect of the consent decree.

b) On the basis of this analysis and on the basis of information gathered from stations, we must arrive at the amount which would be produced for ASCAP under the licenses demanded both under the blanket and the per program formula. Not only should these amounts be determined on the present basis, but they should be projected on the basis of what would be deemed to be a normal development of the television industry.

October 29, 1951

c) In every case not only must the amounts of payments be determined in absolute figures but they should be compared with payments in AM radio, motion pictures, hotel licensing and the like. It may also be germane that ASCAP derives the overwhelming bulk of its income from radio and television whereas performing rights societies in other countries derive only a small proportion of their income from this source.

d) Except for Dumont, all networks presently have blanket licenses so that ASCAP is receiving from the networks the full amounts demanded by it and the stations are contributing by means of the payments that they make to the networks. Stress should, therefore, be laid on local use of music. In analyzing the use by stations, we should compute how many performances there are, how much the cost is per performance under the blanket and per program demands, the nature of the performance (whether by means of old movies, films newly made for television, records and electrical transcriptions, pianists and singers, small instrumental combinations or major musical productions) and the ratings of the programs using this music should be determined. We should, in each case, have enough information about the program to know whether its chief appeal factor is music or whether it is a comedian, a dramatic performance, a sports event or the like. We will need expert testimony as to the appeal factor of the music since it is necessary to controvert ASCAP's claim that it is the compositions performed that makes the major contribution to the appeal of the program and influences continued tune-in.

e) The relation of net to gross in television as compared to AM radio must be most carefully analyzed. We should also ascertain the amounts paid for musical talent on local programs. The cost per performance in TV as compared to the cost per performance in AM and the appeal of the music in AM as compared to the appeal of the music in TV are factors bearing upon the reasonableness of cost.

f) ASCAP apparently intends to claim that TV puts extra demands upon its members, tends to exhaust ASCAP's repertory more rapidly, and the like. For rebuttal purposes, a study should be made of the number of compositions written and published by ASCAP members and a study should be made of record and sheet music sales to indicate the general health of the music business and that ASCAP members are not doing an ounce more work because of the advent of television. In connection with this, information should be gathered with respect to ASCAP's general economic status, the increased payments it is receiving both from radio and television, and the increased distribution that it is making to its members as a result, comparing these to the stagnant or declining amounts received from other users of public performing rights. We should also be prepared in rebuttal with comparisons of the amounts paid to ASCAP with the amounts paid to other licensing organizations such as BMI and SESAC. In this connection it should be remembered that the amounts are not comparable because of physical service in furnishing material, scripts, recordings and the like in the case of BMI.




Samuel J. Silverman, Esq.,

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October 29, 1951

The important thing, of course, is to start the compilation of information under unified and dynamic supervision. As I understand it, the next step is to be a meeting with the research people of NARTB, the major networks and BMI. A lawyer will obviously have to be prepared to give the major portion of his time, not only in stimulating and guiding research, but in making sure information is being obtained in evidentiary form. I think you will have many sources for your information but perhaps you will have to have one imaginative consultant, perhaps from academic circles, to act as a co-ordinator and to aid in the allocation of work load.

Cordially,

A handwritten signature in dark ink, appearing to be 'Sydney M. Kaye', with a stylized, flowing script.

Sydney M. Kaye

SMK:ICR